# Dominion Law Reports

CITED "D.L.R."

COMPRISING EVERY CASE REPORTED IN THE COURTS OF EVERY PROVINCE, AND ALSO ALL THE CASES DECIDED IN THE SUPREME COURT OF CANADA, EXCHEQUER COURT, THE RAILWAY COMMISSION, AND THE CANADIAN CASES APPEALED TO THE PRIVY COUNCIL

ANNOTATED

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## VOL. 23

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# CASES REPORTED

## IN THIS VOLUME.

# TABLE OF ANNOTATIONS

*(Alphabetically arranged)*

APPEARING IN VOLS. 1 TO 23 INCLUSIVE OF THE DOMINION LAW REPORTS.

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# CASES REPORTED, VOL. XXIII., PART 1.

## CANADIAN PACIFIC R. CO. v. McDONALD.

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*Judicial Committee of the Privy Council, Viscount Haldane, Lord Parker, and Lord Sumner. July 22, 1915.*

1. MASTER AND SERVANT (§ V—340)—WORKMEN'S COMPENSATION—CONSTRUCTION OF STATUTE—ANNUITIES—CAPITAL RENT.

The provision in sub-head 2 of art. 7322 of the Quebec Workmen's Compensation Act, that "the capital of the rents," claimed in cases of total or partial incapacity, "shall not exceed the sum of $2,000," does not govern the amount of rent where it is claimed from the employer himself, but derives its meaning from the subsequent art. 7329, which gives the injured person or his representatives the option to demand that the capitalised value of the rent shall be paid over to an approved insurance company which will provide an annuity in lieu thereof.

[*Grand Trunk R. Co.* v. *McDonald*, 5 D.L.R. 65, 21 Que. K.B. 532, followed; 16 D.L.R. 830, 49 Can. S.C.R. 163, affirmed.]

Statement

APPEAL from the Supreme Court of Canada, *C.P.R. Co.* v. *McDonald*, 16 D.L.R. 830, 49 Can. S.C.R. 163.

The judgment of the Board was delivered by

Viscount Haldane, L.C.

VISCOUNT HALDANE:—The question which their Lordships have to decide arises as follows: The respondent was a railway man employed by the appellants. He suffered serious injury in an accident, the result of which was that he was partially but permanently incapacitated. He claimed that this entitled him to compensation, under the Workmen's Compensation Act of the Province of Quebec, to the extent of a rent or annuity for his life of $337.50, being half of the amount by which his earning capacity had been reduced by the injury. The appellants did not dispute the title to compensation on this basis, but contended that under article 7322 (sub-head 2) of the Act the amount of the rent that could be claimed could not exceed the annual rent procurable with a capital sum of $2,000. The only question to be decided is one of construction of the statute.

Art. 7322 provides in sub-sec. 1 that in cases to which the section applies the person injured is to be entitled in case of absolute and permanent incapacity to a rent equal to half his yearly wages, and in case of permanent and partial incapacity to a rent

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equal to half the sum by which his wages have been reduced in consequences of the accident. Sub-head 2 of the same article provides that

> the capital of the rents shall not, however, in any case, except in the case mentioned in article 7325, exceed $2,000.

Under that article the Court may reduce the compensation if the accident was due to the inexcusable fault of the workman, or increase it if the accident was due to the inexcusable fault of the employers. Under art. 7329, after the amount of the compensation has been agreed or after judgment ordering it to be paid, the employer is to pay the amount of the compensation to the person injured or his representatives,

> or, as the case may be and at the option of the person injured or his representatives, shall pay the capital of the rent to an insurance company designated for that purpose by order-in-council.

Their Lordships are of opinion that the article last quoted interprets the reference to capital in sub-head 2 of art. 7322, and that this sub-head cannot properly be read as applying to any other case than that in which the injured person or his representatives demand that the capital, by which they understand to be meant the capitalized value of the rent shall be paid over to an approved insurance company which will provide an annuity in lieu thereof. They observe that in sub-head 2 of art. 7322 the limitation is expressed to refer only to the capital of the rents described, and that no reference to this capital occurs elsewhere in the article. To read the words as governing the amount of the rent where it is claimed from the employer himself, instead of the amount to be paid to an insurance company for providing an annuity in lieu thereof, would be to introduce extraordinary results. An old man with a short expectation of life would obtain a larger compensation than a younger man. The latter, though equally incapacitated, might have been earning higher wages than the former. Yet on the construction of the Act contended for by the appellants he would get a smaller annuity from the insurance company by reason of his longer expectation of life. But it is natural that the Act should give the claimant the option of having what will often prove the better security of the obligation of the approved insurance company. Their Lordships think that the meaning of sub-head 2 is that if the claimant

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exercises this option the capital sum which he can compel the employer to find and, it may be, to withdraw from his business, is to be limited. The sub-head would have been introduced by the draftsman more naturally after art. 7329. But their Lordships do not find in the place in the Act where the words have been introduced any sufficient reason for construing them otherwise than according to what appears to be their natural meaning, and as they have been construed by the majority of the learned Judges in the Courts of Quebec both in the present case and in *Grand Trunk Railway Co.* v. *McDonald*, 5 D.L.R. 65, 21 Que. K.B. 532. They concur in the view that the expression "capital of the rents" in sub-head 2 of art. 7322 derives its meaning as there used from the subsequent art. 7329. If so, it is only at the option of the claimant that the capital demand can be made to which the limitation applies. It may or may not suit him, having regard to his age and his estimate of his security for his rent, to exercise the option. The injured man may think it wisest to avoid the risk of proceedings to revise the amount of the compensation on the ground of diminution of the disability, under art. 7346, which provides for such revision, by changing the rent into an annuity purchased from an insurance company. To enable him to secure these advantages it was natural that the legislature should give him an option and no less natural that the amount of capital he could call for in connection with them should be limited. It is, however, far from being obvious why the words should have been introduced at all if they are to bear the construction for which the appellants contend, and are to restrict, not only the amount in case of exercise of the option, but the rent itself, in such a fashion that a man earning high wages would get no more compensation for being incapacitated from earning than a man earning much less. Their Lordships are of opinion that the language employed is not such as would naturally have been relied on if the intention had been to produce so remarkable a result.

They will, therefore, humbly advise His Majesty that the appeal should be dismissed with costs, to be taxed as between solicitor and client according to the conditions prescribed by the order-in-council giving leave to appeal.

*Appeal dismissed.*

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## THE BRITISH COLUMBIA ELECTRIC R. CO. v. LOACH.

*Judicial Committee of the Privy Council, Viscount Haldane, Lord Parker, and Lord Sumner. July 26, 1915.*

1. STREET RAILWAYS (§ III C—42)—DEFECTIVE BRAKES—INJURIES AT CROSSING — FAILURE TO LOOK—INJURY AVOIDABLE NOTWITHSTANDING CONTRIBUTORY NEGLIGENCE.

An inoperative brake on a car which is incapable of arresting its movement when running at an excessive speed will render the railway company liable for personal injuries resulting from a collision of the car with a vehicle at a level crossing, notwithstanding the contributory negligence of the injured in not looking out to see whether the road was clear.

[*Loach* v. *B.C. Electric R. Co.*, 16 D.L.R. 245, 19 B.C.R. 177, affirmed.]

2. NEGLIGENCE (§ II F—120)—ULTIMATE NEGLIGENCE—INJURY AVOIDABLE NOTWITHSTANDING CONTRIBUTORY NEGLIGENCE.

Negligence of a defendant incapacitating him from taking due care to avoid the consequences of the plaintiff's negligence may, though anterior in point of time to the plaintiff's negligence, constitute ultimate negligence, rendering the defendant liable, notwithstanding the contributory negligence of the plaintiff.

[*Brenner* v. *Toronto Ry. Co.*, 13 O.L.R. 423, reversed in 15 O.L.R. 195, 40 Can. S.C.R. 540, referred to; *Scott* v. *Dublin & Wicklow R. Co.* 11 Ir. C.L.R. 377, 394, followed; *Loach* v. *B.C. Electric R. Co.*, 16 D.L.R. 245, 19 B.C.R. 177, affirmed.]

Statement

APPEAL from the British Columbia Court of Appeal, *Loach* v. *B.C. Electric R. Co.*, 16 D.L.R. 245, affirmed.

The judgment of the Board was delivered by

Lord Sumner.

LORD SUMNER:—This is an appeal from a judgment of the Court of Appeal of British Columbia in favour of the administrator of the estate of Benjamin Sands, who was run down at a level crossing by a car of the appellant railway company and was killed. One Hall took Sands with him in a cart, and they drove together on to the level crossing and neither heard nor saw the approaching car till they were close to the rails and the car was nearly on them. There was plenty of light and there was no other traffic about. The verdict, though rather curiously expressed, clearly finds Sands guilty of negligence in not looking out to see that the road was clear. It was not suggested in argument that he was not under a duty to exercise reasonable care, or that there was not evidence for the jury that he had disregarded it. Hall, who escaped, said that they went "right on to the track," when he heard Sands, who was sitting on his left, say "Oh," and looking up saw the car about 50 yards off. He

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says he could then do nothing, and with a loaded waggon and horses going two to three miles an hour he probably could not. It does not seem to have been suggested that Sands could have done any good by trying to jump off the cart and clear the rails. The car knocked cart, horses, and men over, and ran some distance beyond the crossing before it could be stopped. It approached the crossing at from 35 to 45 miles an hour. The driver saw the horses as they came into view from behind a shed at the crossing of the road and the railway, when they would be ten or twelve feet from the nearest rail, and he at once applied his brake. He was then 400 ft. from the crossing. If the brake had been in good order it should have stopped the car in 300 ft. Apart from the fact that the car did not stop in time, but overran the crossing, there was evidence for the jury that the brake was defective and inefficient and that the car had come out in the morning with the brake in that condition. The jury found that the car was approaching at an excessive speed and should have been brought under complete control, and although they gave as their reason for saying so the presence of possible passengers at the station by the crossing, and not the possibility of vehicles being on the road, there can be no mistake in the matter, and their finding stands. It cannot be restricted, as the trial Judge and the appellants sought to restrict it, to a finding that the speed was excessive for an ill-braked car, but not for a properly-braked car, or to a finding that there was no negligence except the "original" negligence of sending the car out ill-equipped in the morning.

Clearly if the deceased had not got on to the line he would have suffered no harm, in spite of the excessive speed and the defective brake, and if he had kept his eyes about him he would have perceived the approach of the car, and would have kept out of mischief. If the matter stopped there, his administrator's action must have failed, for he would certainly have been guilty of contributory negligence. He would have owed his death to his own fault, and whether his negligence was the sole cause or the cause jointly with the railway company's negligence would not have mattered.

It was for the jury to decide which portions of the evidence

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were true, and, under proper direction, to draw their own inferences of fact from such evidence as they accepted. No complaint was made against the summing-up, and there has been no attempt to argue before their Lordships that there was not evidence for the jury on all points. If the jury accepted the facts above stated, as certainly they well might do, there was no further negligence on the part of Sands after he looked up and saw the car, and there was then nothing that he could do. There he was, in a position of extreme peril and by his own fault, but after that he was guilty of no fresh fault. The driver of the car, however, had seen the horses some perceptible time earlier, had duly applied his brakes, and if they had been effective, he could, as the jury found, have pulled up in time. Indeed, he would have had 100 ft. to spare. If the car was 150 ft. off when Sands looked up and said "Oh," then each had the other in view for 50 ft. before the car reached the point at which it should have stopped. It was the motorman's duty, on seeing the peril of Sands, to make a reasonable use of his brakes in order to avoid injuring him, although it was by his own negligence that Sands was in danger. Apparently he did his best as things then were, but partly the bad brake and partly the excessive speed, for both of which the appellants were responsible, prevented him from stopping as he could otherwise have done. On these facts, which the jury were entitled to accept and appear to have accepted, only one conclusion is possible. What actually killed Sands was the negligence of the railway company, and not his own, though it was a close thing.

Some of the Judges in the Courts below appear to have thought that because the equipment of the car with a defective brake was the original cause of the collision, and could not have been remedied after Sands got on the line, no account should be taken of it in considering the motorman's failure to avoid the collision after he knew that Sands was in danger. "You cannot charge up the same negligence under different heads," said Murphy, J., at the trial; "you cannot charge it up twice."

On the question of ultimate negligence,

he observes,

that negligence must arise on the conditions as existing at the time of the accident. It would, of course, be absurd to say the company has any

opportunity between the time that this rig appeared upon the track and the collision to remedy any defect in the brake. If there was such a defect I think it was original negligence and not what may possibly be termed "ultimate negligence."

In the Court of Appeal Macdonald, C.J.A., delivering a dissentient judgment in favour of the present appellants, says:—

> Where one party negligently approaches a point of danger, and the other party, with like obligation to take care, negligently approaches the same point of danger, if there arises a situation which could be saved by one and not by the other, and the former then negligently fail to use the means in his power to save it, and injury is caused to the latter, that failure is designated ultimate negligence, in the sense of being the proximate cause of the injury. In this case it is sought to carry forward, as it were, an anterior negligent omission of the defendants, though continuing, it is true, up to the time of the occurrence, and to assign to it the whole blame for the occurrence, although by no effort of the defendants or their servants could the situation at that stage have been saved.

So, too, McPhillips, J.A., also dissenting, says:—

> Upon the evidence, whether it was because of defective brakes or any of the acts of negligence found against the defendant, none of them were acts of negligence arising after the act of contributory negligence of the deceased, and cannot be held to be acts of negligence which, notwithstanding the later negligence of the deceased, warrant judgment going for the plaintiff. . . . The motorman after he saw the vehicle could not have stopped the car . . . therefore, as nothing could be then done by the motorman to remedy the ineffective brake, the want of care of the deceased was the direct and effective contributory cause of the accident resulting in his death.

These considerations were again urged at their Lordships' bar under somewhat different forms. It was said (1) that the negligence relied on as an answer to contributory negligence must be a new negligence, the initial negligence which founded the cause of action being spent and disposed of by the contributory negligence. Further, it was said (2) that if the defendants' negligence continued up to the moment of the collision, so did the deceased's contributory negligence, and that this series, so to speak, of replications and rebutters finally merged in the accident without the deceased ever having been freed from the legal consequence of his own negligence having contributed to it.

The last point fails because it does not correspond with the fact. The consequences of the deceased's contributory negligence continued, it is true, but, after he had looked, there was

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no more negligence, for there was nothing to be done, and, as it is put in the classic judgment in *Tuff* v. *Warman*, 5 C.B.N.S., at p. 585, his contributory negligence will not disentitle him to recover

> if the defendant might by the exercise of care on his part have avoided the consequences of the neglect or carelessness of the plaintiff.

As to the former point, there seems to be some ambiguity in the statement. It may be convenient to use a phraseology which has been current for some time in the Canadian Courts, especially in Ontario, though it is not precise. The negligence which the plaintiff proves to launch his case is called "primary" or "original" negligence. The defendant may answer that by proving against the plaintiff "contributory negligence." If the defendant fails to avoid the consequences of that contributory negligence, and so brings about the injury, which he could and ought to have avoided, this is called "ultimate" or "resultant" negligence. The opinion has been several times expressed, in various forms, that "original" negligence and "ultimate" negligence are mutually exclusive, and that conduct which has once been relied on to prove the first, cannot in any shape constitute proof of the second.

Here lies the ambiguity. If the "primary" negligent act is done and over, if it is separated from the injury by the intervention of the plaintiff's own negligence, then no doubt it is not the "ultimate" negligence in the sense of directly causing the injury. If, however, the same conduct which constituted the primary negligence, is repeated or continued, and is the reason why the defendant does not avoid the consequences of the plaintiff's negligence at and after the time when the duty to do so arises, why should it not be also the "ultimate" negligence which makes the defendant liable?

This matter was much discussed in *Brenner* v. *The Toronto Railway Company*, 13 O.L.R. 423, when Anglin, J., delivered a very valuable judgment in the Divisional Court. The decision of the Divisional Court was reversed on appeal, 15 O.L.R. 195, 40 Can. S.C.R. 540, but on other grounds, and in their comments on the decision of the Divisional Court, Duff, J., in the Supreme Court, and also Chancellor Boyd, in *Rice* v. *Toronto*

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*Railway*, 22 O.L.R. 446, at 450, and Hunter, C.J., in *Snow* v. *Crow's Nest Company*, 13 B.C.R. 145 at 155, seem to have missed the point to which Anglin, J., had specially addressed himself.

The facts of that case were closely similar to those in the present appeal, and it was much relied on in argument in the Court below. Anglin, J., following the decision in *Scott* v. *Dublin and Wicklow R. Co.*, 11 Ir. C.L.R. 377, p. 394, observes as follows:—

> Again the duty of the defendants to the plaintiff, breach of which would constitute ultimate negligence, only arose when her danger was or should have been apparent. Prior to that moment there was an abstract obligation incumbent upon them to have their car equipped with sufficient emergency appliances ready and in condition to meet the requirements of such an occasion. Had an occasion for the use of emergency appliances not arisen, failure to fulfil that obligation would have given rise to no cause of action. Upon the emergency arising, that abstract obligation became a concrete duty owing to the plaintiff, to avoid the consequences of her negligence by the exercise of ordinary care. Up to that moment there was no such breach of duty to the plaintiff. In that sense the failure of the defendants to avoid the mischief, though the result of an antecedent want of care, was negligence which occurred in the sense of becoming operative immediately after the duty in the breach of which it consisted arose. It effectively intervened between the negligence of the plaintiff and the happening of the casualty.
>
> But there is a class of cases, when a situation of imminent peril has been created either by the joint negligence of both the plaintiff and the defendant, or it may be that of the plaintiff alone, in which, after the danger is, or should be, apparent, there is a period of time of some perceptible duration during which both, or either, may endeavour to avert the impending catastrophe. . . . If, notwithstanding the difficulties of the situation, efforts to avoid injury duly made would have been successful but for some self-created incapacity, which rendered such efforts inefficacious, the negligence that produced such a state of disability is not merely part of the inducing causes—a remote cause or a *causa sine qua non* —it is in very truth the efficient, the proximate, the decisive cause of the incapacity, and, therefore, of the mischief. Negligence of a defendant incapacitating him from taking due care to avoid the consequences of the plaintiff's negligence may in some cases, though anterior in point of time to the plaintiff's negligence, constitute ultimate negligence rendering the defendant liable, notwithstanding a finding of contributory negligence of the plaintiff. . . .

Their Lordships are of opinion that, on the facts of the present case, the above observations apply and are correct. Were it otherwise the defendant company would be in a better posi-

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tion, when they had supplied a bad brake but a good motorman, than when the motorman was careless but the brake efficient. If the superintendent engineer sent out the car in the morning with a defective brake, which, on seeing Sands, the motorman strove to apply, they would not be liable, but if the motorman failed to apply the brake, which, if applied, would have averted the accident, they would be liable.

The whole law of negligence in accident cases is now very well settled, and, beyond the difficulty of explaining it to a jury in terms of the decided cases, its application is plain enough. Many persons are apt to think that, in a case of contributory negligence like the present, the injured man deserved to be hurt, but the question is not one of desert or the lack of it, but of the cause legally responsible for the injury. However, when once the steps are followed the jury can see what they have to do, for the good sense of the rules is apparent. The inquiry is a judicial inquiry. It does not always follow the historical method, and begin at the beginning. Very often it is more convenient to begin at the end, that is at the accident, and work back along the line of events which led up to it. The object of the inquiry is to fix upon some wrongdoer the responsibility for the wrongful act which has caused the damage. It is in search not merely of a casual agency but of the responsible agent. When that has been done, it is not necessary to pursue the matter into its origins; for judicial purposes they are remote. Till that has been done there may be a considerable sequence of physical events, and even of acts of responsible human beings, between the damage done and the conduct, which is tortious and is its cause. It is surprising how many epithets eminent Judges have applied to the cause, which has to be ascertained for this judicial purpose of determining liability, and how many more to other acts and incidents, which for this purpose are not the cause at all. "Efficient or effective cause," "real cause," "proximate cause," "direct cause," "decisive cause," "immediate cause," "*causa causans*," on the one hand, as against, on the other, "*causa sine qua non*," "occasional cause," "remote cause," "contributory cause," "inducing cause," "condition," and so on. No doubt in the particular

cases in which they occur they were thought to be useful or they would not have been used, but the repetition of terms without examination in other cases has often led to confusion, and it might be better, after pointing out that the inquiry is an investigation into responsibility, to be content with speaking of the cause of the injury simply and without qualification.

In the present case their Lordships are clearly of opinion that, under proper direction, it was for the jury to find the facts and to determine the responsibility, and that upon the answers which they returned, reasonably construed, the responsibility for the accident was upon the appellants solely, because, whether Sands got in the way of the car with or without negligence on his part, the appellants could and ought to have avoided the consequences of that negligence, and failed to do so, not by any combination of negligence on the part of Sands with their own, but solely by the negligence of their servants in sending out the car with a brake whose inefficiency operated to cause the collision at the last moment, and in running the car at an excessive speed, which required a perfectly efficient brake to arrest it. Their Lordships will accordingly humbly advise His Majesty that the appeal should be dismissed, with costs.

*Appeal dismissed.*

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## JONES v. TOWN OF SWIFT CURRENT.



*Saskatchewan Supreme Court, Haultain, C.J., Newlands, Lamont, and McKay, JJ. July 15, 1915.*

1. Highways (§ IV C—218)—Ditch on highway—Driving unbroken horses—Contributory negligence.

One driving a team of unbroken horses whose speed he could not control is not entitled to recover against a municipality for injuries he sustained by being caused to jump off the vehicle to avoid falling into a ditch on the highway.

2. Highways (§ IV C—210)—Driving unbroken horses—Violation of by-law—Contributory negligence.

The driving of an unbroken team of horses, in contravention of a by-law prohibiting the act, precludes recovery for injuries sustained by reason of a defect in the highway.

3. Highways (§ IV A—120)—Establishment by private parties—Duty as to repairs—Liability of municipality.

A highway laid out by private persons, which had not been assumed by the municipality, does not impose a duty on the latter to keep it in repair, as to render it liable for injuries sustained in consequence of a ditch constructed thereon by private persons.

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McKAY, J.

APPEAL from a judgment for defendant at a trial with a jury.

*W. B. Willoughby*, K.C., and *Begg*, for appellant.

*G. C. Taylor*, K.C., and *Bothwell*, for respondent.

The judgment of the Court was delivered by

McKAY, J.:—The facts are shortly as follows: The appellant is a horse dealer, buying and selling horses, and at the time of the accident had his sales barn on what was then called 15th Street, between Chaplin and Herbert Streets, practically on the outskirts of the town of Swift Current. In July, 1911, the appellant had purchased a band of 20 or 30 ranch horses from Montana, which were driven across country to Swift Current, and two days before the accident he had sold the two horses in question out of this band to a man by the name of Allen. According to Allen's evidence they were sold to him as green, unbroken horses. Another quieter team had been bought at the same time by his brother. Part of Allen's evidence is as follows:—

> Mr. Jones and I were talking after I took the other horses, and he told me like this. He said, "You have had hard luck and you have no quiet horses, and if you buy from me I have a quiet horse, and I will drive them one at a time with the quiet horse." Then I said: "All right, then, I will buy from you." I was looking at a team from another green bunch in town, and I then decided to buy from Mr. Jones. He says: "I have a good, quiet horse, a good big horse, and I have a wagon with a brake on, and there is no danger, and I will hook them up one at a time." Then the bargain was put through.

The evidence of other witnesses shews that the horses had been driven before and Jones had been told so.

About two days before the accident while being led into town from the pasture these horses had broken away, to the knowledge of plaintiff as he was present, and were quite wild.

It took the Allens on the day of the accident all forenoon to get the harness on them, although they used plaintiff's special stall with the usual contrivances for harnessing wild horses.

It was arranged appellant would drive the horses in the afternoon. He took some, but not all the usual precautions taken when driving unbroken horses. The neck-yoke was securely fastened to the pole. A long rope halter shank was attached to each horse held by a man, and these men were to get into the wagon keeping hold of the ropes when the horses were being

driven. The appellant also relied on the brake on the wagon. But the precaution of fastening a rope to the fetlock on a front leg of each horse was not followed, nor first hitching with a quiet horse. The appellant and the Allens hitched the horses to appellant's wagon. The appellant took the lines, got into the wagon, and the horses immediately started to run, pulling the halter shanks from the men holding them. After running north and north-westerly over the prairie, the appellant directed them south-westerly up grade, hoping thus to stop them. When they reached the top of the grade the appellant claims he directed the horses easterly along Chaplin St. down grade and they proceeded easterly two blocks, from 14th to 16th St. on Chaplin St. Chaplin St. runs east and west, and is intersected by 16th St., running north and south. On the east side of 16th St. and some 12 ft. from the eastern boundary there was a ditch running parallel with the eastern boundary from 3 to 5 ft. deep and 6 to 8 ft. wide. The appellant's speed descending the grade towards 16th St. kept increasing. He was able to guide the horses to a certain extent, but could not stop them. As he approached 16th St. he remembered the open ditch at the east side of the same, and believing it was impossible for him to turn to the right or to the left on 16th St., and hoping to save himself from injury in consequence of the ditch, he jumped out of his wagon, and in falling broke all the bones in his left ankle, with the result that he was confined to his bed for some time and his leg had to be amputated below the knee.

Chaplin and 16th Sts., where the accident happened, was little travelled and had never been graded. They were laid out by private parties before this area was added to the town of Swift Current, and there is no evidence that they had been established as a public work by by-law or had been assumed for public use by the council. The ditch had been constructed by a private party, apparently before this area was added to the town, but the evidence on this point is not clear.

The principal ground of appeal is the learned trial Judge's definition of the words "control of the horses."

It seems to me that under the circumstances of this case the learned trial Judge was right in defining these words, and charging the jury as he did.

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The place where appellant was driving was not in the country but in a town, and at the place of accident 16th St. was little travelled and Chaplin St. practically not travelled, and the appellant knew of the ditch, and he never from the time the horses were hitched, had control of them. He had never driven nor had he seen these horses driven before. It is not a case of a traveller driving along with a reasonably quiet team, or at any rate with a team over which he had control, over a road where there was much traffic, and the horses for some reason without any fault of the driver suddenly taking fright, or becoming unmanageable and running away, as was the case in *Sherwood* v. *City of Hamilton*, 37 U.C.Q.B. 410.

The case under review is also distinguishable from *Foley* v. *East Flamborough*, 29 O.R. 139, and 26 A.R. (Ont.) 43, where the driver and passenger were travellers driving along a country road over which there was much traffic and the team over which the driver had had control ran away, and the driver lost temporary control. The appellant in this case never had control to lose it. In my opinion the appellant should shew that he at one time had control, but through no fault of his he lost that control.

> But if it be shewn that, without fault or negligence on his part, his horses escaped from his control, and ran away or became unmanageable, so that no care could be exercised by him in respect to them, and this condition of things is not produced by a defect in the highway, the question is whether the plaintiff can recover: *Sherwood* v. *City of Hamilton*, 37 U.C.Q.B. 410 at 416.

And in *Toms* v. *Whitby*, 37 U.C.Q.B. 100, at 107, Burton, J., makes the following observation:—

> A horse is not to be considered uncontrollable in this sense, if he merely shies or starts, or is momentarily not controlled by his driver.

In my opinion, when a person undertakes to drive a team of horses in a town under the circumstances of this case, he should have control of them as defined by the learned trial Judge, and I do not think the objections to his charge are maintainable.

With regard to the ground of appeal No. 3 (as to what was the proximate cause of the accident), I do not think, in view of the other questions submitted, it was necessary to submit to the jury the question suggested.

As to ground of appeal No. 2 (as to violating the by-law), I am of the opinion that no valid objection can be taken to question

6 submitted to the jury. True it is that the by-law does not mention "preparing to break in horses on the street," but it prohibits "breaking in horses on the street," and if a person breaks in horses on the street, he must of necessity before doing so, prepare to do it. The jury answered this question in the affirmative and their answer covers the breaking in on the streets, which is clearly prohibited in the following words:—

> 7. No person shall break in or train any horse, mare or gelding on any street . . . in the town, etc.

The appellant, according to the finding of the jury, was engaged in a prohibited undertaking, during which he met with the accident and cannot recover damages for his injuries from the respondent.

With regard to ground of appeal No. 1 (as to the sufficiency of evidence). I think that the jury had ample evidence to justify them to come to the conclusion they did in answering question No. 1 (as to defendant's negligence) in the negative, as no doubt they referred to absence of negligence on the part of the respondent, and it was practically so admitted by counsel for appellant at the argument on appeal.

The Town Act, ch. 85, R.S.S., sec. 383, on which this action is based, states that

> Every public road, street . . . *shall be kept in repair* by the town and in default of the town so to keep the same in repair, the town, besides being subject to any punishment provided by law shall be civilly responsible for all damages sustained by any person by reason of such default.

The learned trial Judge's charge to the jury as to the meaning of the words "shall be kept in repair" is well within the authorities dealing with the meaning of these words.

In *Castor* v. *Township of Uxbridge*, 39 U.C.Q.B. 113, Harrison, C.J., at p. 122, dealing with these words in the Ontario Municipal Act, says:—

> In the determination of the question, it is necessary to take into account the nature of the country, the character of the roads, the care usually exercised by municipalities in reference to such roads, the season of the year, the nature and extent of travel, the place of the accident, and the manner and nature of the accident.

Also see *Lucas* v. *Township of Moore*, 3 A.R. 602 at 608; *Foley* v. *East Flamborough*, 29 O.R. 139, at 141.

The evidence clearly shews that 16th St. north of Chaplin was

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very little travelled and that Chaplin St. east of 16th St. practically not travelled, and that for ordinary traffic there was ample room to pass on 16th St. to the west of the ditch in question. These streets were in sufficient repair to accommodate the amount and kind of traffic passing over them.

Furthermore, sec. 384 of the Town Act, ch. 85, R.S.S., reads as follows:—

> 384. The last preceding section shall not apply to any road, *street*, bridge, alley or square, crossing, sewer, culvert, sidewalk or other work made or laid out by any private person until the same has been established as a public work by by-law or has been assumed for public use by the council.

The evidence shews that these streets, 16th and Chaplin, where the accident occurred were laid out by private persons, and there is absolutely no evidence that they were established as public works by by-law, or had been assumed for public use by the council.

This defence is pleaded by respondent, and in my opinion the onus was on appellant to prove that the town had established them as public works by by-law, or that they had been assumed by the council. The evidence on the other hand shews that nothing had ever been done to them by the respondent town, or any money expended on them by it.

In *Hubert* v. *Yarmouth*, 18 O.R. 458, which was an action to compel a municipal corporation to maintain and repair a street laid out by private parties, Armour, C.J., at p. 467, says:—

> Hughes street having been laid out by private persons, the defendant corporation was not liable to keep it in repair until it was established by by-law of the corporation or otherwise assumed for public use by the corporation.
>
> It was clearly not established by by-law of the corporation, but it was contended that the performance of statute labour thereon with the consent of the pathmasters, and on one occasion with the consent of the councillor for the ward and of the reeve, was evidence that it was otherwise assumed for public use by the corporation.
>
> But we do not think that such action as was given in evidence in this case by the pathmasters and one or two of the councillors, all of whom might be interested in having a road assumed by the corporation, could bind the corporation and work an assumption by the corporation of a road laid out by a private person.
>
> The acts required to work such an assumption must be corporate acts, and here it was admitted that there was no corporate act of assumption;

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and *the acts must be clear and unequivocal, and such as clearly and unequivocally indicate the intention of the corporation to assume the road.*

The foregoing case was much stronger in favour of the appellant therein than the case under review is for the present appellant.

For the above reasons I think the jury was justified in coming to the conclusion there was no negligence on the part of the respondent, and, in any event, clearly the respondent would not be liable by virtue of this sec. 384.

I may further add that, in my opinion, this case comes within *Atkinson* v. *City of Chatham*, 31 Can. S.C.R. 61, where Gwynne, J., at 65, states as follows:—

> But the *causa causans* was the violent, uncontrollable speed at which the horses were running away. Without saying that in no case can a person injured in a carriage drawn by running-away horses maintain an action for damages, we hold that in the present case the sole conclusion justified by the evidence is that the uncontrollable manner in which the horses were running away was the cause of the accident.

I would, therefore, dismiss the appeal with costs.

*Appeal dismissed.*

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## ORR v. ROBERTSON.

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*Ontario Supreme Court, Falconbridge, C.J.K.B., Riddell, Latchford, and Kelly, JJ. June 1, 1915.*

1. MECHANICS' LIENS (§ II—7)—RIGHT TO—WORK CONTRACTED BY LESSEE —REQUEST OF LESSOR.

Work contracted by a sub-lessee in pursuance of an agreement with his lessor authorizing him to build upon the land, constitutes a "request" on the part of the lessor within the meaning of sec. 2 (*c*) of the Mechanics Lien Act, R.S.O. 1914, ch. 140, which extends the operation of the statute to the estate of any person at whose *request* work is done or materials furnished.

2. LANDLORD AND TENANT (§ III B—47)—BUILDING AUTHORIZED BY LESSOR —PERSONAL LIABILITY OF LESSEE.

While a lessee may not be personally liable on a building contract authorized by his lessor, the personal liability of the lessee will nevertheless attach to orders for work personally given by him.

[*Re International Contract Co.*, L.R. 6 Ch. 525, referred to.]

APPEALS from the judgment of an Official Referee.

Statement

*Shirley Denison*, K.C., and *A. W. Holmested*, for the appellant Tyrrell.

*Gideon Grant*, for the appellant Hyland.

*G. L. Smith*, for the plaintiff, respondent.

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The judgment of the Court was delivered by

RIDDELL, J.:—This is an appeal from the decision of R. S. Neville, K.C., in a mechanic's lien proceeding—the defendants Tyrrell and Hyland appealing.

Upon the hearing of the appeal we decided against the contention of Tyrrell in respect of his personal liability, but reserved the question as to the lien upon his interest in the land in respect of the sum for which he was not directly and personally liable.

In 1913, the Rowland estate leased the land to Tyrrell for a term of years; in the same year, Tyrrell sublet to Hyland, with an agreement that Hyland should build according to plans to be approved by Tyrrell. Hyland entered into a contract with the plaintiff (executed unfortunately under seal by Hyland's agent in his own name) to build accordingly. Even if Tyrrell took no further or other part in the matter, we think this is a "request" under R.S.O. 1914, ch. 140, sec. 2(c). The section reads:—

> (c) "Owner" shall extend to any person . . . having any estate or interest in the land upon or in respect of which the work or service is done, or materials are placed or furnished, at whose request and
>
> (i) upon whose credit, or (ii) on whose behalf, or (iii) with whose privity and consent, or (iv) for whose direct benefit
>
> work or service is performed or materials are placed or furnished, and all persons claiming under him or them whose rights are acquired after the work or service in respect of which the lien is claimed is commenced or the materials furnished have been commenced to be furnished.

While, to render the interest of an owner liable, the building, etc., must have been at his request, express or implied, there is no need that this request be made or expressed to the contractor—if the owner request another to build, etc., and that other proceeds to build, by himself or by an independent contractor or in whatever manner, the building being in pursuance of the request, the statute is satisfied. The taking of a contract from Hyland to build is a request within the meaning of the statute.

This appeal must be dismissed with costs.

The personal liability of Hyland is alone in question.

The learned Referee has given effect to the rule in *In re International Contract Co., Pickering's Claim* (1871), L.R. 6 Ch. 525, and has declined to fix Hyland with personal liability under the contract, and this is not complained of.

From an examination of the evidence I am of opinion that

so far as personal liability has been made to attach to Hyland, there is sufficient evidence to justify the Referee in deciding, as he has done, that Hyland gave the order personally for such work.

Hyland's appeal should also be dismissed with costs.

*Appeals dismissed with costs.*

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## MAITLAND v. MATHEWS.



*Alberta Supreme Court, Scott, Stuart, Beck, and Simmons, JJ. March 26, 1915.*

1. DAMAGES (§ III A 3—62)—MEASURE OF—BREACH OF CONTRACT TO SELL LAND—OUTSTANDING TAX LIEN—LOSS OF BARGAIN.

Where the vendor of land held under a contract of purchase from another at a tax sale allowed the tax title to lapse by failure to register the transfer within two months from the order confirming the tax sale, as required by the Land Titles Act, Alta., 1906, ch. 24, sec. 60, the right of the purchaser will not, in the absence of any stipulation to the contrary, extend to the recovery of substantial damages for the loss of the bargain but will be limited to the recovery of the amount he has paid and interest and his costs and expenses in connection with the agreement.

[*Bain* v. *Fothergill*, L.R. 7 H.L. 158, applied; *Day* v. *Singleton*, [1899] 2 Ch. 320, considered.]

2. DAMAGES (§ III A 3—62)—MEASURE OF—BREACH OF CONTRACT TO SELL LAND.

For breach of a contract to sell land, a purchaser is not entitled to damages based upon the difference between the contract price and the value at the time of the breach, but the damages are limited to the return of the purchase money, if any, and interest and expenses to which he has been put in connection with the making of the contract or incurred on the strength of it, unless he has been guilty of fraud or like improper conduct, or unless having it in his power to obtain title, he does not do his best to do so; he is obliged to take and incur all reasonable trouble and expense in that behalf, but is not obliged to purchase any outstanding interest at an outlay of any substantial sum.

[*Day* v. *Singleton*, [1899] 2 Ch. 320, referred to.]

Statement

APPEAL from a judgment of Harvey, C.J.

*C. S. Blanchard*, for appellants.

*N. McLarty*, for respondents.

Scott, J.

SCOTT, J., concurred with Stuart, J.

Stuart, J.

STUART, J.:—This is an appeal from a judgment of the Chief Justice whereby he awarded a plaintiff, purchaser, substantial damages against the defendants, vendors, for failure to give a good title to the land agreed to be sold.

The agreement in question was executed on August 29, 1911,

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and contained a stipulation by the vendors that upon payment of the purchase price, they would immediately transfer to the purchaser in fee simple the land in question free from encumbrances.

The defendants had, by an agreement in writing dated June 1, 1911, agreed to purchase the land from one Spencer, and by that agreement Spencer had made a similar covenant in regard to furnishing a good title.

Spencer had purchased the land at a tax sale, and had obtained the statutory transfer which was dated June 2, 1911. That land sale had, of course, taken place sometime previously. This sale had been confirmed by an order of Mr. Justice Simmons on May 5, 1911. But Spencer had omitted to have the transfer registered within the time (two months) provided in the Land Titles Act, and also to get any order before the two months had elapsed extending the time for such registration. According to the provisions of the statute the result was that the transfer to Spencer had ceased to be valid as against the owner on July 6, 1911, that is, some weeks before the defendants agreed to sell to the plaintiff. The defendants, when they sold to the plaintiff, knew that their vendor, Spencer, had bought the property at a tax sale and that he held a transfer. This transfer they had seen in Spencer's possession when they entered into their agreement with him or at any rate shortly afterwards and before they resold to the plaintiff. They, for this reason, supposed that Spencer had a good title and was able to convey the same to them. Whether they were justified in this supposition and in acting upon it to the extent of entering into an obligation on their own account to convey a good title to the plaintiff so as to be relieved from liability for substantial damages seems to be the crucial point in the case.

The real question to be decided is whether the rule in *Bain* v. *Fothergill*, L.R. 7 H.L. 158, is to be applied or whether that case can either be distinguished as to its exact facts, excluding therefrom the general condition of affairs as to titles in England and the course of business there in dealing with lands or be treated as not the law of this province as not being applicable to the conditions of affairs here in regard to such affairs and course of

business. These two questions are quite distinct and should not be confused.

In *Bain* v. *Fothergill*, the facts were that in 1863 the defendants had entered into an agreement with the executors of the estate of a Mr. Hill for the purchase from them of a number of properties for the sum of £250,000. Among these properties was a certain leasehold property called Miss Watter's Royalty for a valid assignment of which the consent of the lessors was necessary. The lessors were willing to execute the consent to the assignment provided the proposed assignees, that is, the defendants, would execute a duplicate of it. In June, 1865 (after two years) this consent was executed by the lessor and a duplicate was sent to the solicitors for the executors, who sent it on to the solicitors for the defendants. The consent contained a proviso that the proposed assignees, the defendants, should not be able to assign without the consent of the owners of the reversion for the time being. The duplicate consent remained in the hands of the defendant's solicitors unexecuted for two years more. It appeared that the proposed purchase by the defendants from the executors of Hill was still on foot. Before October 17, 1867, Fothergill, one of the defendants had been informed that the consent of the lessors was necessary before he could secure a valid assignment of Miss Watter's royalty from the executors of Hill. On the date last mentioned, Fothergill, on behalf of his partnership firm, after a conversation with Patterson, a member of the plaintiff firm, signed a letter which began as follows:—

> Messrs. Bain, Blair & Patterson, Gentlemen: We offered to sell you our interest in Miss Watter's royalty upon the following terms.

The terms were then set out and the letter ended thus:—

> The usual covenants for our protection as standing between you and our lessors to be made by you.

This offer was accepted by Patterson by an endorsement on the letter signed in the name of his firm. At the conversation no mention was made by Fothergill of the necessity for such consent. As the case stated, either it did not cross his mind or, if it did occur to him, he forebore to mention it feeling sure that no difficulty would arise in respect to such consent and that it was, therefore, a matter of no importance. Patterson did not

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know of the actual necessity for the consent, although such a consent was generally required in regard to mining leases in the district in question. He learned of it in a few days and then both plaintiffs and defendants applied without success to the lessors to get the consent. Fothergill then proposed to abandon the sale, but the plaintiffs insisted on the agreement and in September, 1868, that is, the next year, the defendants tried again to get the lessors to consent to the assignment from Hill's executors to the defendants, but the latter refused unless the defendants would enter into an agreement to sell, not to the plaintiffs, but to one Stirling, and as this was the only condition upon which the defendants could get the assignment to themselves carried through at all, they finally did enter into an agreement to sell to Stirling. Upon hearing of this the plaintiff began an action for damages for the loss of their bargain. In these circumstances, the House of Lords in 1874, decided that the plaintiff was not entitled to recover any damages further than the amount paid and interest and his costs and expenses in connection with the agreement. In substance the case decided that a vendor, who sells property, knowing that his ability to convey depends upon the consent of persons over whom he has no legal control and which he has not yet obtained, is not liable for substantial damages if he cannot convey what he agreed to convey owing to failure to obtain this consent, at any rate, in a case where he either forgot at the moment of making the bargain about the necessity of securing this consent or if he did remember it had no doubt that it could be secured and so did not mention the matter to his purchaser.

It seems to me, therefore, that we cannot treat this case as merely deciding that where some unexpected difficulty arises after the agreement in getting a proper claim of title made out the vendor is not liable for substantial damages. If this were really all that was involved in the decision, I should have felt much inclined to look with favour upon the suggested inapplicability of the law there laid down to, our system of land titles. But the fact is that in *Bain* v. *Fothergill*, *supra*, the defendant vendor actually knew of the difficulty which would arise; he knew his power to convey depended upon the caprice of the

lessors and the most that could be said in his favour was that he rather carelessly overlooked the matter when he entered into the agreement. The complete facts of *Bain* v. *Fothergill* are not set forth in the report of the decision in the House of Lords, but are to be found in the report of the case below, 40 L.J. Ex. 37.

Now, if we assume that the expression "without any fault" which is applied to a vendor throughout *Bain* v. *Fothergill*, applies not merely to some default occurring after the agreement is made in the way of omission to do all he can in the way of positive refusal or creation of difficulties, but also to a default prior or at the time of entering into the agreement in the way of failure to be certain that he can convey before he agrees to do so, it seems to me that the defendants in *Bain* v. *Fothergill*, were, to say the least, as much at fault as were the defendants in this case. Indeed, I think they were more at fault than the present defendants because the present defendants honestly relied on their own vendor having in his possession a transfer which they supposed he would be able to register. And even if we attach blame to them for not having, first, before they made a covenant to convey satisfied themselves that they would be able to do so, I cannot see that their fault was any greater than Fothergill's omission to make certain that the lessors would consent to the assignment of the lease to him before he entered into an agreement to assign it himself.

It seems to me, therefore, that the present case cannot be distinguished from *Bain* v. *Fothergill*, as to its exact facts and that for the reasons I have given the difference in our system of land titles is no reason for declaring that the law there laid down is inapplicable, in the sense of unsuitable, to this province. Neither do I think we should declare the rule inapplicable merely because land is bought and sold much more for speculation in this country than it is in England.

With regard to the case of *Day* v. *Singleton*, [1899] 2 Ch. 320, the facts were that the defendant's executor well knew that the lessors' consent had to be obtained and the defendants made no effort to obtain it. The Court of Appeal was of the opinion that the defendants' default was much greater than found by the trial Judge because, contrary to his view they considered that

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a certain letter written by the defendants' solicitors to the lessors amounted to an incitement to refuse consent. But there is no doubt that the Court of Appeal were of opinion that the defendant was liable aside from this latter point merely because it was not shewn that he had done all he could to obtain the consent required or that if he had done all he could, he would not have succeeded. Lindley, M.R., said:—

> Singleton never asked the lessors to accept Day as their tenant without a bar and consequently it would be for him, Singleton, to shew that if he had asked them they would have refused.

Whatever one may think of the ingenious manner in which Lindley, M.R., avoided the difficulty, he saw in adopting a different measure of damages in a case where the vendor fails to do all he can to secure title from that which would, by the rule in *Bain* v. *Fothergill*, apply if he had done all he could and failed, it seems clear that the real *ratio decidendi* in *Day* v. *Singleton* is to be found in the vendor's failure to do all he could and his failure to shew that all possible efforts would have been unavailing. Sir Francis Jeune said: "The present action is not, I think, to be regarded as an action for breach of contract to sell the lease of the hotel in question. It is really an action against Mr. Singleton for failing in his duty to obtain, *if he could*, the consent of the charterhouse to the transfer."

In my opinion *Day* v. *Singleton* cannot furnish a reason for departing from the rule in *Bain* v. *Fothergill*. In one respect the case at bar is more favourable to the defendants than either *Bain* v. *Fothergill* or *Day* v. *Singleton*, because the defendants here honestly believed that Spencer not only would be able, but could be compelled to convey, while in both the other cases the vendor knew that he would require to get a consent which in law he could not compel. I can see no distinction in principle between the case of a title to a leasehold estate which depends upon the uncontrollable option of the owner of the reversion and the case of a title to the fee simple which is outstanding in a person, who is under no enforceable agreement, or any agreement at all, to convey.

The only remaining circumstance is that it appears that the defendants made no independent efforts of their own to secure title, but left everything to Spencer. There are in my opinion

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two reasons why the defendants' case cannot be prejudiced by this consideration. First, it is obvious that Spencer made every effort to secure title which it was possible to make and that he was the only person who could really do anything anyway. Second, and this is perhaps the same thing in another form—it did appear that the defendants would have failed no matter what they had done. I think the expressions I have quoted from *Day* v. *Singleton* and also other expressions throughout the judgments in that case, shew that in such circumstances the Court of Appeal would have adopted the narrowed measure of damages. If it be suggested that the defendants could have gone and bought the land all that needs to be pointed out in reply is that in *Bain* v. *Fothergill* the defendant could have bought the lessor's consent to the assignment.

Throughout the whole consideration of this case, I have sympathized very much with the view that a vendor ought to be subject to the larger measure of damages which the learned Chief Justice imposed upon the defendants here and it is really with regret that I find myself compelled with much respect to conclude that the rule in *Bain* v. *Fothergill* must be held to apply.

I think, therefore, the appeal should be allowed with costs, the judgment below varied by striking out the paragraph awarding $1,000 damages and by ordering that the plaintiff should pay the defendants' costs of the action. The defendants offered before the action to return the full amount for which judgment is now given and they paid it into Court with their defence. In these circumstances they are clearly entitled to their costs of the action.

BECK, J.:—This is an appeal from the decision of the learned Chief Justice on which in an action by a purchaser against his vendors, he gives damages for the loss of the bargain. The agreement between the parties is dated August 29, 1911. The defendants, Mathews *et al.*, had purchased from one Spencer under agreement dated June 1, 1911. Spencer's title consisted of a transfer from the City of Medicine Hat on a sale for taxes. The tax transfer is dated June 2, 1911, and the sale was confirmed by a Judge by order dated May 5, 1911.

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Sec. 80 of the Land Titles Act (1906, ch. 24), says:—

> A transfer of such land sold . . . for arrears of taxes as hereinafter provided shall be registered within a period of two months of the date of the order of confirmation, unless in the meantime this period be extended by order, filed with the registrar, of the Court or a Judge; and shall cease to be valid as against the owner of the land so sold, and any person or persons claiming by, from, or through him, if not registered within that period or within the time fixed by such order.

Spencer apparently not being aware of the provision of the statute, neglected to register his tax transfer within two months of May 5, or within the same time to get an order extending the time for so doing. The transfer had, therefore, ceased to be valid against the former owner of the land, and every one claiming under him. The statute, and not a rule of Court requiring the registration of the transfer or the obtaining of an extension order to be obtained "in the meantime" that is within the two months of the date of the confirming order, I think the Court was without jurisdiction after the lapse of that period to make an extending order.

It is obvious then, that even at the date of the agreement between the plaintiff and the defendant (August 29) Spencer had no title to the property, and that, therefore, the defendants had none.

At the time the defendants bought from Spencer they were made aware of the tax transfer, but they too were not aware of the necessity for its registration within a limited time (then past), and supposed Spencer to have a good title.

No one connected with the affair seems to have discovered that Spencer had no title by reason of the non-registration of the tax transfer or the obtaining of an extension order until August, 1912, when the plaintiff asked for title. Then the defendants explained to the plaintiff why they could not give title and offered to pay the plaintiff back his purchase money, meaning no doubt to include interest and any expenses.

Subject to what I have to say later, the only thing that can be laid to the defendants' account is that they were negligent in not more carefully investigating Spencer's title. It is suggested that there was something more that they could do when they discovered the real state of the title. But it seems reason-

ably clear from the evidence that by this time the property had been sold by the former registered owner and that his transferee had become registered as owner. So that at that stage the defendants could have made title only by buying from the registered owner.

In the interval between August 29, 1911, and the discovery of the true state of the title in August, 1912, it is suggested that the defendants might have procured title (without purchase), by getting Spencer to apply for a new order confirming the tax sale. Probably such a course was open. Had the defendants become aware of the true condition of the title, and had it occurred or been suggested to them that such a course was even probably open I think they would have been in duty bound to take it, and thereby do the best that lay in their power to obtain title. But this was not the case, and they were in no respect open at any time to a charge at most of anything more than ignorance of law, and carelessness in investigating their vendor's title. A vendor is not, in my opinion, bound, in order to make title to his purchaser, to spend any substantial sum by way of purchase money for an outstanding interest for which he is not already liable; the limit of his obligation I think is to go to reasonable trouble and expense.

Though not much of the reasoning upon which *Bain* v. *Fothergill* was decided is applicable in this jurisdiction, this Court has held that the rule in that case should be maintained. That rule as explained in later cases, especially *Day* v. *Singleton*, [1899] 2 Ch. 320, is, I think, that for breach of a contract to sell land, a purchaser is not entitled to damages based upon the difference between the contract price and the value at the time of the breach, but the damages are limited to the return of the purchase money, if any, and interest and the expenses to which he has been put in connection with the making of the contract or incurred on the strength of it, unless he has been guilty of fraud or like improper conduct, or having it in his power to obtain title, does not do his best to do so, being obliged to take and incur all reasonable trouble and expenses in that behalf, but not being obliged to purchase any outstanding interest at all events, if the purchase price be a substantial sum. In this view, I think the defendants

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here were not liable for substantial damages. They offered to pay back the portion of the purchase money they had received. I think it is clear enough they meant to include interest upon it, and that though perhaps not mentioned, they would have been ready, if the question had been raised, to pay any reasonable expenses incurred by the plaintiff.

The action was for substantial damages. I think the appeal should be allowed, with costs. I am writing this without access to the appeal book; I understand money has been paid into Court; the usual order should follow.

Simmons, J.

SIMMONS, J., dissented.

*Appeal allowed.*

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N. S.
S. C.

## McDOUGALL v. McDOUGALL.

*Nova Scotia Supreme Court, Graham, C.J., and Russell, and Drysdale, JJ. May 15, 1915.*

1. TRESPASS (§ I B—10)—TAKING GRAVEL FROM BEACH—ACTION BY POSSESSORY HOLDER—PARTITIONED CO-TENANCY.

A co-tenancy which had been divided by the co-tenants into their respective severalties, and held exclusively by one of them for a period sufficient to give him a possessory title under the Statute of Limitations (R.S.N.S., ch. 167, secs. 10, 14 and 15), will entitle the latter, or his successor in title, to maintain an action of trespass for the taking of gravel from the unfenced beach adjoining his lands.

Statement

APPEAL from the judgment of Ritchie, J.

*H. McInnes*, K.C., and *W. C. Macdonald*, for plaintiff, appellant.

*Finlay McDonald*, for defendant, respondent.

The judgment of the Court was delivered by

Graham, C.J.

GRAHAM, C.J.:—Archibald McDougall in 1833 obtained a grant of 200 acres of land near Christmas Island on the shore of Bras d'Or lake. In 1852 he conveyed 7 acres of it on the shore of the lake to one of his sons, Malcolm McDougall. He died intestate leaving several children, but the portion of the grant on the shore of the lake (other than the 7 acres) has been since his death, in the year 1861, occupied by these sons, Malcolm, Michael and John in severalty, they having divided it among themselves even before their father's death in the following order from west

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to east, John, Michael and Malcolm, and having occupied the respective portions.

The plaintiff is the son of Michael, and the defendant, Hector F. McDougall, is the son of Malcolm.

The 7 acre lot in front transferred before his death apparently was part of the portion intended for Malcolm and also by the plan adjoins Michael. The description is as follows:—

A certain piece, parcel or tract of land lying and being at Christmas Island aforesaid and known and distinguished as part of lot No. 16, which part is butted and bounded as follows: That is to say: Bounded on the northward by the waters of Christmas Island and bounded on the eastward by land now in the possession of the said Malcolm McDougall, being the eastward line of the said lot granted to Arch. McDougall, and bounded and on the southward by a part of the said lot and distinguished by an old line of road leading from Grand Narrows to Little Bras d'Or and bounded on the westward by a line of road leading from the house of the said Archibald McDougall to the shore of Christmas Island aforesaid, containing in all, by estimation, seven (7) acres more or less.

The original grant ran "101 chains more or less to the shore, thence westerly along the shore to the place of commencement."

This is important in view of the contention as to the ownership of the locus, a beach from which gravel was taken by Hector and which was perhaps never under fence as beaches are not very often.

It appears that one Charles J. Campbell having recovered a judgment against Michael, the sheriff, in 1873, sold under a description the portion occupied by Michael to Campbell, the important boundaries in that description being "eastwardly by lands of Malcolm, etc.," northwardly by waters of Bras d'Or lake."

In 1884 Campbell conveyed this back to Michael McDougall. In 1892 Michael conveyed to George H. Murray, and in 1894 Mr. Murray conveyed to the present plaintiff. The descriptions vary a little, an early one describing it as 120 acres and the two later ones as 140 acres. But the surveyor, Purves, proves that each one of these descriptions covers the locus.

As to occupation, Michael's shop has been at the point E on the plan M.A. at the intersection of his and the 7 acre line with the present railway line which here runs side by side with the public road crossing the grant. From C to D on the other side of

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the road there is a fence on the line between him and the 7 acre lot which has been kept up for 35 years. Likewise from E in the other direction towards the shore as far as point A there is a fence kept up about 23 years. From there to the shore there is no fence, but it is contended that the line is the fence line produced to the shore.

I ought to mention that sometime before Malcolm McDougall's death when the plaintiff proposed to construct the fence between C and A it was agreed between him and Malcolm that it would correspond with the line of the fence above the public road and the plaintiff fenced the cross fence according to that agreement and James, Malcolm's son, made the line fence as it is at present from C to A.

Going back to the description of the 7 acre lot, it is bounded "on the westward by a part of said lot" (the Archibald McDougall grant) "and distinguished by a line of road leading from the house of said Archibald McDougall to the shore of Christmas Island aforesaid." This house is located "old house." The evidence shews that from the house to the public road (crossing the grant) there was but a path, but from the public road, *i.e.*, from the shop to the shore, there was a cartway along this line. The expression "below the road" is thus explained.

This cartway was a private road used by the owners of the shop running along the eastern line down to a landing place on the shore and was used in connection with the landing and shipping of articles for the purposes of these owners. There is also occupation by the plaintiff proved of the land to the west of this line produced to the shore.

I am satisfied that this occupation with the deeds which certainly gave colour of title to Michael and his successors constitute a title in the plaintiff which would enable him to maintain this action of trespass against the defendant.

As I have pointed out the description of the grant goes to the shore, and of the deeds from 1873 the northern boundary is the "waters of Bras d'Or lake." So that if there has been any change by the land gaining on the sea, as the defendant contends, that accretion would belong to the plaintiff in front of whose land it has formed.

The defendant, however, pleaded this defence also:—

7. The defendant further says that the defendant is a tenant in common with the plaintiff in the whole of the original grant to Archibald McDougall as set forth in paragraph 5 of the statement of claim.

In par. 5 the plaintiff unnecessarily alleged that he "is the owner of the whole of the original grant to his grandfather Archibald McDougall with the exception and exclusion of the seven acres herein described."

At the trial, or in a brief sent in afterwards, the plaintiff contended among other things, in order to meet this defence of tenancy in common and therefore no action would lie, that there was an ouster. And the learned trial Judge held that there was not an ouster and he gave judgment on that ground for the defendant. But it turns out that there was not a tenancy in common in respect at least to this locus.

The defendant is the son of Malcolm, who died about 1908. But Malcolm made a will. In this will, after specific bequests of land, he made this devise:—

All the residue of my lands wherever situate . . . to my children James, John, Mary Elizabeth and Sarah to be equally divided between them, *i.e.*, excluding the defendant Hector.

And in respect to Hector the only specific devise of land is contained in par. 4 of the will, as follows:—

4. To Hector McDougall one half of the lot below the road on which the stores stand with one half the stores; also the lot containing thirty-two acres on which he now resides with the lot adjoining it on the western side containing forty-five acres; also the beach on the north side of the Grand Narrows in the county of Victoria.

And this does not cover the land in dispute. The one-half of the lot below the road on which the stores stand constitutes the 7 acre lot.

It is proved by most satisfactory evidence that the *locus* is not in the 7 acre lot, but is covered by the deeds to the plaintiff. And he himself says in cross-examination, p. 57:—

Q. Would you be able to tell the Court where you got this sand, whether on the 7-acre lot or on the Island property? (Another grant.) A. I can't positively say. Q. You cannot tell at this time if it was from the island property or from the 7-acre property that you took the sand? A. I think it was here "G" because that is where you get the best sand.

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"G" is outside of the 7-acre lot and of the island property, and is upon the plaintiff's land, according to the plan M.A. used in evidence.

This disposes of the defence of tenancy in common of the plaintiff and the defendant. But there are other descendants of Archibald and of John and devisees of Malcolm, who might set up a claim to a share of this land marked on the plan M.A. as "D. J. McDougall" and "claimed by D. J. McDougall" and would be entitled to a share of any damages.

I am satisfied upon a perusal of the evidence, some of which I have already referred to, that the plaintiff has as against all of these a good title under the Statute of Limitations, R.S. N.S., ch. 167, secs. 10, 14, and 15.

Some evidence was given that between 50 and 60 years ago Malcolm had a shop on the shore and that it was moved to the locality of the present shop on the 7 acre lot. There is no doubt about its existence or that it was moved. It was probably moved to the 7 acre lot after the deed was obtained. But the defendant contends that it was originally situated over on the land now claimed by the plaintiff and the 7 acre lot went that far west. But that, even if not disputed, affords no proof helpful in this case. It may at that early period have been on Archibald's land, he being still alive, although occupied by Malcolm as one of his sons. It quite clearly was not on the 7 acre lot according to the weight of the evidence. The fact that sand was once taken for the Glebe House from this *locus*, or that the defendant at other times took it, does not shew that any right existed in the public to take sand therefrom or tend to divest the plaintiff's title to the *locus*. The appeal must be allowed.

In regard to damages the plaintiff has proved that before the action was brought about 80 tons of sand were taken and up to the trial about 420 tons more. At 50 cents, the maximum price given by the defendant himself, this would make the damages $250, and I think the plaintiff ought to have judgment for that sum with costs of the action and appeal.

*Appeal allowed with costs.*

## GLOBE AND RUTGERS FIRE INS. CO. v. WETMORE AND CO. LTD.

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*Nova Scotia Supreme Court, Graham, C.J., and Russell, Drysdale, and Ritchie, JJ. May 15, 1915.*

1. PRINCIPAL AND AGENT (§ III—30)—LIABILITY OF AGENT—DISOBEDIENCE OF INSTRUCTIONS.

An agent who disobeys the instructions of his principal is liable to pay for any loss which in the ordinary course of things is the result of such disobedience.

2. INSURANCE (§ I D—22)—AGENTS—UNAUTHORIZED ACCEPTANCE OF RISK —LIABILITY OF AGENT.

An insurance agent who exceeds his authority in underwriting a risk at a lower rate than that authorized by the insurance company will, in the event of loss, be liable to the company to the extent of the loss it is made to pay.

3. DAMAGES (§ III A 1—51)—MEASURE OF—BREACH OF AGENCY CONTRACT —ISSUING POLICY UNDER UNAUTHORIZED RATE—LIABILITY FOR LOSS.

In an action by an insurance company against their agent for issuing a policy under an unauthorized rate, the proper measure of damages is the loss the company is obliged to pay and not the difference between the premiums at which the policy was issued and the rate at which the risk would have been accepted.

Statement

APPEAL from the judgment of Finlayson, Co. C.J.

*C. J. Burchell*, K.C., for defendants, appellants.

*B. W. Russell*, for plaintiffs, respondents.

The judgment of the Court was delivered by

Ritchie, J.

RITCHIE, J.:—The defendant company was the agent of the plaintiff company. It is alleged that the defendant company accepted a fire risk in violation of its instructions. There was a loss which the plaintiff company was obliged to pay, and this action is brought to recover the amount so paid.

The rule of law is clear that if an agent disobeys the instructions of his principal he is liable to pay for any loss which in the ordinary course of things is the result of such disobedience. This is so well settled that it is unnecessary to say more than to state the rule.

The liability of the defendants in this case depends entirely upon the true construction of the correspondence. In all such cases each case must depend on the particular language used. A decision as to what is the proper construction of certain correspondence is of no assistance in arriving at the proper construction to be given to other and different correspondence. Authority, however, is of importance if it lays down a principle as to

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how a certain class of documents or correspondence is to be construed, as in this case, the authority from a principal to his agent.

The much argued case of *Ireland* v. *Livingstone*, L.R. 5 H.L. 395, is cited on behalf of the defendants as establishing a principle as to how an agent's authority is to be construed and it does establish a principle. At p. 416, Lord Chelmsford said:—

> Now it appears to me that if a principal gives an order in such uncertain terms as to be susceptible of two different meanings and the agent *bonâ fide* adopts one of them and acts upon it, it is not competent to the principal to repudiate the act as unauthorized because he meant the order to be read in the other sense of which it is equally capable.
>
> It is a fair answer to such an attempt to disown the agent's authority to tell the principal that the departure from his intention was occasioned by his own fault, and that he should have given his order in clear and unambiguous terms.

To bring a case within this principle the terms of the authority must be uncertain and "equally capable" of either construction. When Lord Chelmsford uses the word "susceptible" in this connection I understand him to mean fairly and reasonably susceptible. He did not mean that language was to be tortured to raise a doubt.

In Bowstead on Agency, at p. 72, the rule is stated in substantially the same terms. I quote:—

> Where the authority of an agent is conferred in such ambiguous terms, or the instructions given to him are so uncertain, as to be fairly capable of more than one construction, every act done by him in good faith, which is warranted by any one of those constructions, is deemed to have been duly authorized though the construction adopted and acted upon by him was not the one intended by the principal.

The Court is not called upon to decide which of the two constructions was intended by the principal, but the question for decision is as to whether or not the correspondence is uncertain, equally capable of two constructions, and fairly and reasonably susceptible of the construction which the defendants contend for.

There is no object whatever in discussing the ambiguity in the correspondence which gave rise to the litigation in *Ireland* v. *Livingstone*, *supra*. That the correspondence was reasonably capable of two constructions is demonstrated by the fact that there was so much difference of opinion among English Judges

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of high repute. I quote the correspondence upon which the result in this case must depend:—

Sydney, N.S., Apl. 24/13.

Globe & Rutgers Ins. Co., New York.

What percentage if any of schedule of $200,000 covering buildings and machinery Nova Scotia Car, Halifax, rate one ninety, attaching 26th will you carry. Wire reply.

WETMORE & CO.

April 25th, 1913.

Wetmore & Co., Sydney, N.S.

Will carry ten per cent. schedule Nova Scotia Car, Halifax, rate two naught three three not less.

GLOBE & RUTGERS FIRE INS. CO.

April 25th, 1913.

Messrs. Wetmore & Co., Sydney, N.S.

Your telegram of the 24th received asking "what percentage if any of schedule of two hundred thousand covering buildings and machinery Nova Scotia Car, Halifax, rate one ninety," to which we replied "Will carry ten per cent schedule Nova Scotia Car, Halifax, rate two naught three three not less."

This is the average rate (2.033) and we will not write it for any less than that rate, so if you have committed us for less than that rate cancel at once.

Numerous letters have been written, also telegram of the 18th, regarding policies 760138-9 Dom. Coal Company, which we ordered cancelled, and for which you took credit in your February account. We advised you that if they were not returned immediately that we would not allow you credit for the same in your February account. Your office gives this office considerable annoyance in not answering correspondence or paying attention to orders. You have apparently overlooked the fact that the company at least expects replies, and as we have received none up to date and have not received the policies mentioned above, we must ask that you reply to this letter at once. There is no reason why you should not answer our communication.

Certainly if you desire to be known as one of the good agents of the Globe & Rutgers you should answer correspondence. You will be kind enough to immediately reply to this letter. We do not care to be compelled to write to you again.

Very truly yours,

VICE-PRESIDENT.

May 23rd, 1913.

Messrs. Globe & Rutgers Ins. Co., New York.

We are herewith enclosing daily report on policy No. 760954 covering $5,000 on schedule (building and machinery) of the Nova Scotia Car Works Ltd., Halifax. We will be very much obliged if you will accept this risk as we are anxious to help our Halifax agent out with this line. The rate is 1.90 per cent. which is the tariff rate fixed by the Board on April last. The schedule, as you will notice, covers on buildings and machinery only.

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We are also enclosing policy No. 760954 covering $2,000 on the Hackmatack Inn Co., cancelled from date of issue. Our Halifax agent informs us that upon consideration he decided not to accept this insurance as the Hackmatack Inn Co. are not in a very strong position financially.

Also enclosing daily report on policy No. 760216, covering $1,000 on dwelling and furniture, John Robertson, Big Pond.

Yours very truly,

WETMORE & CO. LTD.

May 27th, 1913.

Messrs. Wetmore & Co. Ltd., Sydney, N.S.

We have your favour of the 23rd enclosing daily report 760954 Nova Scotia Car Works, $5,000, rate 1.90. You were advised by telegram by us what rate we wanted on this risk and we will not take it at any less, and we want you to cancel this policy at once. We believe the rate we told you was 2.033.

Very truly yours,

SECRETARY.

I am of opinion that the correspondence is not equally capable of two constructions and is not fairly or reasonably susceptible of the construction for which the defendants contend. On the contrary the instructions, as I read them, are positive and distinct and made the duty of the defendants clear.

The defendants' telegram of April 24, asks a specific question, namely, what proportion of schedule of two hundred thousand covering buildings and machinery Nova Scotia Car at Halifax at the rate of one ninety will you take? The reply is specific and definite, namely, ten per cent. at rate two naught three three, not less. Next in order comes the letter of the plaintiffs, dated April 25, which was sent as confirming the telegram. It contains this clause, "This is the average rate (2.033) and we will not write for any less than that rate, so if you have committed us for less than that rate cancel at once."

It is here if at all that the alleged ambiguity or want of clearness comes in.

The plaintiff company is a tariff company. That is to say, it does not accept risks at a less rate than the rate established for that risk by the Nova Scotia Board of Underwriters, but it does not necessarily accept risks at the tariff rate.

Previously to the writing of this letter the Board had established a rate under which the different buildings and machinery covered by this risk would work out at an average rate of 2.033,

and this is what is meant by the word "average" in this letter. But at the time when this letter was written, unknown to the plaintiff, the Board had changed the tariff rate, so that the average rate for the property included in this risk would work out at 1.90.

From the use of the word "average" the defendants undertook to say if the company knew that the tariff had been changed, so that the average rate would work out at 1.90 their instructions would not have been given. In this the defendants were mistaken, because the order to cancel came promptly and before the loss. Mr. Wetmore, as shewn by his affidavit, came to the erroneous conclusion that his principals had made a mistake. He thought he knew better than they did what they ought to do under the circumstances. So did Mr. Cheeseboro in *Washington Fire Ins. Co.* v. *Cheeseboro*, 35 Fed. Rep. 477, but he had to pay the loss.

In my opinion the defendants had no right to decide what the plaintiffs ought to do in consequence of the change in the tariff. Their duty was to do what they were told to do. From first to last there was an unequivocal refusal on the part of the plaintiffs to be on the risk at a less rate than 2.033. In the letter of May 23 the defendants having effected the insurance say:—

> We will be very much obliged if you will accept this risk as we are anxious to help our Halifax agent out with this line.

I have some doubt as to whether the defendants would have written in this strain if at the time they thought the risk had been taken with full authority to take it.

In the view which I take of the correspondence the defendants must be held liable, and I think that the loss which the plaintiffs have had to pay is the measure of damages.

In Bowstead on Agency, at p. 178, it is said:—

> The measure of damages in an action by a principal against his agent for negligence or any other breach of duty by the agent in the course of the agency is the loss actually sustained by the principal, being such loss as in the ordinary course of things would naturally result, or such as under the particular circumstances the agent might reasonably have expected to result from such negligence or breach of duty.

It was contended that the plaintiffs would have accepted the risk at 2.033 and that, therefore, the measure of damages was

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not the loss, but the difference, between the premiums at 1.90 and 2.033.

No authority was cited for this proposition. I think it is unsound. If the defendants had obeyed their instructions the risk would not have been covered. The liability of the plaintiffs to the insured is the result of the disobedience of the plaintiffs' instructions.

Therefore, I think, the loss is the proper measure of damages.

In my opinion the appeal should be dismissed with costs.

*Appeal dismissed with costs.*

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MAN.

K. B.

## LONDON GUARANTEE & ACCIDENT CO. v. HENDERSON AND McWILLIAMS.

*Manitoba King's Bench, Galt, J. August 5, 1915.*

1. MISTAKE (§ VII—150)—MONEY PAID UNDER MISTAKE OF LAW—COSTS—RECOVERY—OFFICERS OF COURT—SOLICITORS.

The rule of law that moneys paid under a mistake of law cannot be recovered does not apply where the mistakes are made by officers of the Court; therefore costs paid by a solicitor under a mistake of rules of practice as to an examination for discovery may be recovered by him.

[*Ex parte James*, L.R. 9 Ch. 609, followed.]

Statement

ACTION for refund of costs paid under mistake of law.

*E. A. Cohen*, for plaintiffs.

*C. S. A. Rogers*, for defendant, McWilliams.

Galt, J.

GALT, J.:—In this action the defendant McWilliams moves, by special leave, for an order that the sum of $62.80, paid by McWilliams' solicitors to the plaintiff's solicitors at the time of service of an appointment for the examination of D. W. Alexander, manager of the plaintiff company, be set off against certain costs payable by McWilliams to the plaintiffs, or that the said sum of $62.80 be repaid to the solicitors for McWilliams, or for such other order as may seem just.

It appears that on September 29th, 1914, an order for production was served upon McWilliams' solicitors and that an insufficient affidavit on production was filed. On June 12th, 1915, an order was made by the Referee for a further affidavit and an appeal from that order was dismissed by Mr. Justice Prender-

gast on 19th July, 1915. The costs payable by McWilliams to the plaintiffs were taxed at $78.69.

On June 21st, 1915, McWilliams being desirous of examining Alexander, agent for the plaintiffs, served an appointment for Alexander's examination here in Winnipeg on the expiration of 14 days as provided by rule 403. Alexander resides in Toronto and McWilliams' solicitors paid to the plaintiff's solicitors the sum of $62.80 as and for conduct money for Alexander. It appears, however, from other rules, especially rule 441, that where a party or his agent is resident out of Manitoba, the examination should take place where such party or agent resides. The mere fixing of 14 days as a limit would exclude the possibility of parties or their agents obeying the appointment if they resided at any great distance.

Upon receipt of the appointment and the $62.80, the plaintiff's solicitors, within a day or two thereafter, came to the conclusion that such a method of examination was not authorized by the rules and they advised Alexander accordingly. Later on, when the question as to whether Alexander was properly examinable under rule 403 was being litigated before the Referee, the plaintiffs' solicitors sent the conduct money on to Alexander, at the same time notifying him that he was under no obligation to attend. The plaintiffs have demanded immediate payment by McWilliams of the said sum of $78.69 costs, and the plaintiffs' solicitors have always refused to recognize any liability on the part of themselves or their clients to return the $62.80 or to allow the said amount to be set off *pro tanto* against the costs aforesaid.

Mr. Cohen, on behalf of the plaintiffs, contends: that his firm are only agents for Alexander and that the conduct money belongs to Alexander, who is not a party to the action, whereas the costs in question belong to the plaintiffs. He points out that McWilliams' solicitors, in making the payment, did so not under any mistake of fact, but under the mistake of law and hence the money is not recoverable. Mr. Rogers, on behalf of McWilliams, argues that the conduct money was in truth paid to the plaintiffs' solicitors as such—not necessarily to Alexander individually.

MAN.

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If my decision in this case depended upon the general rule relied upon by Mr. Cohen that moneys paid under mistake of law cannot be recovered, there would be great force in his contention; but this argument overlooks the fact that where such mistakes are made by officers of the Court the general rule does not apply.

In *Ex parte James*, L.R. 9 Ch. 609, a creditor levied execution on his debtor's goods for a debt exceeding £50, and the sheriff seized and sold them. The debtor filed a petition for liquidation, and served notice of it on the sheriff before the sale. Before the expiration of 14 days after the sale the first meeting of the creditors was held, but no resolution was passed. The sheriff then, after the expiration of the 14 days, paid the proceeds of the sale to the execution creditor. Afterwards a bankruptcy petition was filed by another creditor, which stated the filing of the petition for liquidation and the failure of the proceedings, and the debtor was adjudicated bankrupt under this petition. The trustee demanded the proceeds of the sale from the execution creditor, who paid them to him, believing that he was legally entitled to them: Held, that the Court had jurisdiction to relieve against the mistake of law, and to order the money to be repaid by the trustee to the execution creditor. In delivering judgment, Sir W. M. James, L.J., says:—

> With regard to the other point, that the money was voluntarily paid to the trustee under a mistake of law, and not of fact, I think that the principle that money paid under a mistake of law cannot be recovered must not be pressed too far, and there are several cases in which the Court of Chancery has held itself not bound strictly by it. I am of opinion that a trustee in bankruptcy is an officer of the Court. He has inquisitorial powers given him by the Court, and the Court regards him as its officer, and he is to hold money in his hands upon trust for its equitable distribution among the creditors. The Court, then, finding that he has in his hands money which in equity belongs to some one else, ought to set an example to the world by paying it to the person really entitled to it. In my opinion the Court of Bankruptcy ought to be as honest as other people.

See also *Ex parte Simmonds*, 16 Q.B.D. 308; *Re Brown*, 32 Ch. D. 597; and *Re Opera, Ltd.*, [1891] 2 Ch. 154.

In the present case the plaintiffs' solicitors and McWilliams' solicitors were alike officers of the Court. It was McWilliams' solicitors, it is true, who made the mistake; but the plaintiffs' solicitors speedily realized the mistake and continued to hold

the moneys in question for many days after satisfying themselves that such moneys had been paid to them by mistake. Furthermore, while the subject was being debated before the Referee and had already been decided in favour of Mr. Cohen's contentions, the money is then forwarded to Alexander, and it is seriously argued to me that Alexander is to have the right to say whether or not he will retain these moneys so paid by mistake to the solicitors for the plaintiffs without any liability on the part of anybody to reimburse McWilliams.

Mr. Cohen has argued that Alexander not being a party to this action and not having interests identical with the plaintiffs, it is impossible to set off the moneys paid to him as against costs payable to the plaintiffs.

Under the circumstances above set forth, I think I am entitled to treat these moneys as still being in the hands of the solicitors, for I am very sure that they were not rightfully paid over to Alexander. There is no difficulty that I can see in setting off the amount, namely, $62.80, *pro tanto* against the $78.69. I understand the difference between the two figures has already been paid over by McWilliams' solicitors to the plaintiffs' solicitors.

As regards costs the difficulty pointed out by Mr. Cohen with respect to identifying Alexander with the plaintiffs appears to be substantial. I cannot order Alexander to pay any costs, and it would be a hardship upon the plaintiffs, who are not and never were interested in the conduct money. I must, therefore, direct that the costs of this application be paid by the plaintiffs' solicitors.

*Motion granted.*

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## Re JASPER LIQUOR CO. Ltd.



*Alberta Supreme Court, Beck, J. August 16, 1915.*

1. CORPORATIONS AND COMPANIES (§ VI F 2—350)—LIQUIDATION — PREFERRED CLAIMS—RENT.

A landlord has no preferred claim for past due rent distrained for where the distress lien is not in effect at the date of the commencement of the winding-up proceedings.

Statement

APPLICATION for rent as preferred claim.

*H. R. Milner*, for liquidator.

*J. S. Scrimgeour*, for landlord.

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RE JASPER LIQUOR CO. LTD.
Beck, J.

BECK, J.:—This company was first put into voluntary liquidation under the Provincial Ordinance, ch. 13, 1903, 1st sess., and subsequently a winding-up order was made under the Dominion Winding-up Act, ch. 144, R.S.C., 1906. In the interval the landlord distrained for rent, the money not being made before the winding-up order.

The question I have to decide is whether the landlord has a preferred claim for the past-due rent distrained for. In *Chown Hardware Company, Ltd.* v. *Delicatessen Ltd.*, 15 D.L.R. 502, 7 A.L.R. 320, I stayed proceedings in an action against a company in voluntary liquidation and discharged a garnishee summons issued before judgment. This was largely on the ground that the company was subject to be placed in compulsory liquidation under the Dominion Winding-up Act, and that under sec. 84 of the latter Act, the garnishee summons would be ineffective to give the garnishing creditor any priority. That section, however, unlike the provision in the English Act (the Companies Consolidation Act, 1908, sec. 211), which contains the word "distress," interferes only with a lien, claim or privilege under a "writ of execution," "memorial" or "minute" of judgment, "attachment, garnishee order or other process or proceeding." I think a distress for rent is not included in the expression "other process or proceedings," that being confined by the *ejusdem generis* rule, in my opinion, to process issuing from, or proceedings taken in a Court, or at all events some judicial or quasi-judicial tribunal. The act of distraining on behalf of a landlord is his individual act. The fact of the rent being owing, of itself, creates no lien; the lien is created only by distress. Had the distress been made before the commencement of the voluntary winding-up proceedings (sec. 6) it is clear that the Court could not displace the landlord's lien thereby created. And this notwithstanding the provisions of sec. 23 of the Dominion Act, that section being controlled by sec. 18. See the English cases discussed in Buckley on Companies, 9th ed., p. 329. The distress, however, was made after the commencement of the winding-up proceedings with the result, it seems to me, that it was not effective to create a lien in favour of the landlord against the assets of the company, and this by reason of sec. 7, which provides that:—

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Beck, J.

The following consequences shall ensue upon the commencement of the winding-up of a company under the authority of the ordinance. . . .

Subject to the provisions of sec. 10 hereof, (Wages) "the property of the company" (which cannot mean to interfere with the neglect of the incumbrancers) "shall be applied in satisfaction of its liabilities *pari passu*."

The lien of the landlord not having come into existence at the date of the commencement of the winding-up proceedings I think he can rank only as an ordinary creditor.

I think the Court would have had power under the Provincial Act, sec. 22, sub-sec. 2, to restrain the landlord from proceeding with his distress, the word "proceeding" in that section not being restricted as it is in sec. 84 of the Dominion Act, had it not been that an agreement was reached to submit the question to the decision of a Judge.

The law and practice in such cases under the English Act is stated in concise form in Foa, Landlord and Tenant, 5th ed., pp. 517, *et seq.*

Under the circumstances set out in the statement of facts before me I think the landlord is a creditor of the company and entitled to prove as an ordinary creditor in the liquidation proceedings. There was privity between the landlord and the company, certainly I think privity of estate, probably, owing to the conduct of the parties, privity by contract.

*Application dismissed.*

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## DUTTON v. CANADIAN NORTHERN R. CO.

MAN.

K. B.

*Manitoba King's Bench, Mathers, C.J. May 20, 1915.*

1. RAILWAYS (§ III 7—75)—OPERATION—LACK OF SAFETY APPLIANCES—FIRES.

The Railway Act, Can., sec. 298, places the onus on the railway company of shewing that modern and efficient appliances were used on the locomotive to prevent the sparks from same causing fires in property adjacent to the railway in order to claim the benefit of the limitation of $5,000, which is made applicable by that section in that contingency if the company has not otherwise been guilty of negligence.

2. RAILWAYS (§ III 7—75)—OPERATION—COMBUSTIBLES ON RIGHT OF WAY—FIRES.

Non-compliance with the requirements of sec. 297 of the Railway Act, Can., which requires the company to keep its right-of-way free from dead, dry grass and weeds and other unnecessary combustible matter is negligence on the part of the railway company.

[*Blue* v. *Red Mountain R. Co.*, [1909] A.C. 361, 9 Can. Ry. Cas. 140, followed.]

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3. TIMBER (§ I—3)—RIGHTS OF PURCHASER—LIABILITY OF RAILWAY COMPANY FOR DESTRUCTION.

On a licensee under a timber license from the Department of the Interior making a sale of the logs to another who did the lumbering, the logs when cut became the personal property of the buyer and he has the right to maintain an action against a railway company through whose negligence the same were destroyed while still on the limits, although such buyer had no assignment of the government license.

[*Booth* v. *McIntyre*, 31 U.C.C.P. 183, distinguished].

4. TROVER (§ I—4)—POSSESSORY RIGHTS—WRONGFUL TAKING—ACTION BY DISSEISEE.

A person possessed of goods as his property has a good title as against every stranger and that one who takes them from him having no title in himself, is a wrong doer and cannot defend himself by shewing that there was title in some third person, for as against a wrong doer possession is title.

[*Jeffries* v. *G.W.R. Co.*, 5 El. & Bl. 802; *The Winkfield*, [1902] P. 42; *Glenwood Lumber Co.* v. *Phillips*, [1904] A.C. 405, referred to.]

5. VENUE (§ I—7)—NEGLIGENCE—DESTRUCTION OF TIMBER—PLACE OF ACTION.

An action for the negligent destruction by a fire of the plaintiff's logs piled in readiness for transportation need not be brought in the province in which the logs were situate, but may be brought in another province in which the defendant company carries on business.

[*Tytler* v. *C.P.R.*, 26 A.R. (Ont.), 467, followed.]

6. RAILWAYS (§ III 7—75)—FIRES—DESTRUCTION OF TIMBER—CONTRIBUTORY NEGLIGENCE.

Where a timber license from the Department of the Interior stipulated that the licensee should dispose of the tree tops, branches and other debris, of the lumbering operations in accordance with the directions of the Department, so as to minimize the danger of fire, but it is not shewn that any directions were given by the Department in that respect, the failure of the lumberman, cutting timber by virtue of such license, to so dispose of the debris is not attributable to him as contributory negligence in an action against the railway company for the destruction of his logs by fire caused by sparks from the locomotive.

7. ESTOPPEL (§ III J 3—130)—INCONSISTENCY IN CLAIMS—ACTION FOR DESTRUCTION OF TIMBER—SWORN STATEMENT AS TO QUANTITY—EFFECT.

A plaintiff suing a railway company for the value of logs cut in lumbering operations and which had been set fire by sparks from a locomotive of the railway line which ran through the timber limits, will, in the absence of satisfactory evidence of mistake, be held to the statement made in his sworn return to the Government agent of the number of logs destroyed by the fire.

Statement

ACTION for the value of saw-logs, logging and camp outfit destroyed by fire.

*Hugh Phillips* and *C. S. A. Rogers*, for plaintiffs.

*O. H. Clark*, K.C., and *C. W. Jackson*, for defendants.

Mathers, C.J.

MATHERS, C.J.:—The plaintiff sues for the value of certain saw-logs, logging and camp outfit destroyed by fire on May 26, 1910, on timber berths Nos. 974 and 1597, located along the Greenwood River, in the Province of Saskatchewan. Berth 974 consists of an oblong area three miles wide from east to west and

eight miles long from north to south. Berth 1597 consists of a smaller area one and one-half miles wide by three miles long, immediately north of 974. All the logs burned were at the time of the fire either piled on landings on the banks of the Greenwood River on berth 974, or on skidways in the woods ready to be hauled to the landings. A portion of the logs had been cut on 1597, but these were placed on landings on 974.

The defendant's line of railway crosses berth 974 from east to west about two and one-half miles from the southern end of the berth. The Greenwood River runs almost due south through the centre of both berths, and enters the Red Deer River at the southern end of 974. The plaintiffs had a saw-mill and planing-mill close to the Greenwood River, on the west side, and about one thousand yards south of the defendant's railway line. Connecting these mills with the defendant's railway is a spur track built pursuant to an agreement entered into between the plaintiffs and defendant, which will be hereafter referred to. To the north of the railway line, and on the other side of the river, were a number of shacks occupied by the plaintiff's employees, also a store and barns. The station grounds laid out at this point is named Greenbush, and the village formed by the plaintiff's establishment also bore that name. To the west of this collection of shacks upwards of half a mile, and on the south side of the railway, is the defendant's section house. There were no other houses or buildings for several miles east or west. The distance from the plaintiff's mill to the section house is about seven-tenths of a mile.

The plaintiff has been carrying on lumbering operations on berth 974 since 1905, and on 1597 since February 10, 1910. His method of operation was to cut the logs in the bush during the winter season, and by means of sleighs and "sloops" to bring them to the Greenwood River, and there pile them on landings to await the spring freshets, when they would be floated down the river to the mill to be there sawn into lumber.

The first license to cut timber on berth 974 was issued to James Shaw and Thomas Shaw, of Dauphin, Manitoba, several years prior to the fire, and a renewal license was issued in their name yearly thereafter up to and including the period from May 1, 1909, to May 1, 1910. On September 22, 1905, the plaintiff

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entered into an agreement with Shaw Brothers, the licensees, to purchase all the spruce, tamarac and jackpine on this berth, the plaintiff to do the lumbering. The agreement gave the plaintiff the option of paying a fixed price for all the timber on the limit, or, in the alternative, of paying $1.75 per thousand feet, board measure, for the lumber procured from it, and to comply with the Government regulations with regard to the timber and to pay all dues and ground rents payable to the Government on account of the limit and the timber cut thereon. The plaintiff elected to buy on the latter terms, and he has carried out his agreement with Shaw Bros. on this basis. He has also paid all the ground rents and dues payable to the Government in respect of the logs cut.

Berth 1597 was advertised for sale by the Government on February 9, 1910, and was on that day bought by the plaintiff for $3,210. On February 9, 1910, the plaintiff paid to the Crown timber agent half the purchase price, *viz.*, $1,605, and gave his note for the other half due May 12, 1910, which note, with interest, was paid upon the due date. The plaintiff also paid, on February 9, 1910, the ground rent for one year from that date, amounting to $23.60, and on August 13, 1910, he paid a further sum of $4.65, covering the ground rent for the broken period from February 10, 1911, to April 30, 1911. On August 29, 1910, a license to cut timber was issued to the plaintiff for the period from May 1, 1910, to April 1, 1911, and on May 13, 1911, a renewal license was issued for the period from May 1, 1911, to April 30, 1912. The logs taken from berth 1597 were cut between February 9, 1910, and May 1, 1910, a period for which no license was issued. The plaintiff had, however, paid ground rent for that period, which the Crown timber agent says was paid for the right to cut timber. He had also paid half the purchase price, or bonus, agreed upon, and had given his promissory note for the other half, which was accepted by the responsible officer of the department. Although a license was not issued for the broken period between February 9, 1910, and April 30, 1910, the payment of the ground rent was treated by the department as equivalent to a license, and the plaintiff went into possession and took the logs with the full knowledge and concurrence of the department.

The plaintiff carried on lumbering operations on both berths

during the winter of 1910, and at the close of that logging season he had logs piled at three landings on the west side of the Greenwood River, in addition to a number of logs on skidways in the bush which the early break up of the winter prevented him getting to the landings. The first landing, situate about one and a half miles north of the railway track, sometimes referred to as No. 1 and sometimes as No. 6, contained by actual count five thousand logs. These logs were not of the 1909-10 cut; they were cut and placed on the landing during the previous season, but were not brought to the mill owing to the lowness of the water in the river. The next landing, referred to as No. 2, was $3\frac{1}{4}$ miles north of No. 6, or $4\frac{3}{4}$ miles north of the track. At landing No. 2 the plaintiff's witnesses say there were fifty thousand logs. The estimate of the defendant's witnesses is that at this landing there was burned logs which would have produced 2,800,000 feet of lumber. Allowing fifty feet of lumber per log, which defendant says is a fair average, and according to the defendant's estimate there were 56,000 logs on this landing, or, 6,000 more than the plaintiff claims. Landing No. 5 consisted of a series of skidways extending over about $2\frac{1}{2}$ miles. The official returns made by the plaintiff to the Crown timber agent shews that at this landing there were 38,708 logs taken from berth 974 and 22,885 taken from berth 1597, or a total of 61,593. The plaintiff's record, compiled from reports sent in by the scalers employed at this landing, shews 61,315 logs. All logs at this landing were not burned. The plaintiff's estimate is that 30,000 logs were destroyed. The defendant's timber cruisers estimate that the total loss by fire on this landing was 525,000 feet, or 10,500 logs. The plaintiff has, however, furnished a piece of evidence which I accept as more reliable than estimates made by any of the witnesses at the trial. On December 31, 1910, the plaintiff made returns over his own signature to the Crown timber agent of the number of logs of the cut of 1909-10 on both berths which were burned in the May preceding. The return for 974 gives us burned 48,502, and for 1597, 14,885, or a total of 63,387. These returns were prepared about seven months after the fire, and are verified by the plaintiff's affidavit. The plaintiff was in a much better position then to form a correct judgment as to the amount of his loss than he is now. I therefore accept these returns as stating correctly the number of logs destroyed. To this number the 5,000 burned on

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landing No. 6, which were cut in 1908-9 and therefore not included in the return, and the total is 68,387 logs. I therefore find that the total number of logs burned was 68,387.

In addition to the logs there were camp building and outfit destroyed, the value of which I fix at $1,000.

On May 23, 1910, the defendant's section-foreman, Hawkins, while working at a point about a mile west of the section-house, observed a fire on the right-of-way of the railway on the south side of the track. He says a gravel train hauled by a locomotive had just passed, that there was no fire before the train passed, and there was a fire immediately afterwards. When he first saw the fire he was six or seven telegraph posts (of which there are 32 to the mile) distant from it. Hawkins, with two assistants, went at once by hand-car to the fire. It had then burned about twelve feet. They endeavoured to put it out, but did not succeed. The wind was from the north, and the fire burned due south on berth 974. They fought it until six o'clock that evening. It was then half a mile south of the track, and although it had to a considerable extent subsided it was not extinguished. The conclusion seems to me irresistible that the fire which Hawkins saw was started by sparks emitted from the defendant's locomotive attached to the gravel train spoken of by him. There was no other visible cause. The season was very dry. At the point where the fire started the locomotive was going up-grade, hauling a gravel train. It is common knowledge that under such circumstances a locomotive will emit sparks. All these facts justify the inference that sparks emitted from that locomotive caused the fire: *Farquharson* v. *C.P.R.*, 3 D.L.R. 258; *Kerr* v. *C.P.R.*, 12 D.L.R. 425, 49 Can. S.C.R. 34, 14 D.L.R. 840, 16 D.L.R. 191. Hawkins places the time about two o'clock in the afternoon. According to the defendant's records no train passed Greenbush about that time. The train which, according to the defendant's records, passed through Greenbush closest to two o'clock on May 23 was a gravel train with locomotive No. 139. Hawkins' evidence was taken on commission on November 22, 1912, two years and a half after the event. He might very well be mistaken as to the hour when the train passed and he first observed the fire, but he could not be mistaken as to the fact that there was no fire before the train passed and there was one immediately afterwards. On May 26,

three days later, a fire was observed to be burning south of the section-house. There was a high south-west wind, and in a short time it was burning fiercely. It crossed the track to the north and swept over the whole of berth 974 to the north of the track and a considerable portion of 1597. It was this fire which consumed the logs and other property for which the plaintiff sues. I find as a fact that the fire started on the right-of-way by the defendant's locomotive, and which burned about half a mile south on that day, burned slowly eastward on the 24th and 25th, and on the 26th, fanned by the south-west wind then prevailing, travelled north, crossed the railway track in the vicinity of the section-house, and did the damage complained of.

The section-foreman did not notify the plaintiff's workmen of the fire which started on May 23, and they had no knowledge of its existence until the 26th, when it was beyond control.

The defendant, in addition to several other defences, pleads not guilty by statute, citing sec. 298 of the Railway Act. That section simplifies the plaintiff's proof in an action of this kind. All he is required to do is to prove that his property was damaged by a fire started by a locomotive used by the defendant. Having done that the statute entitles him to a judgment for the full amount of his damages. If, however, it is shewn that the defendant "used modern and efficient appliances and has not otherwise been guilty of negligence," plaintiff can only recover $5,000, no matter how great his damages have been. The statute casts upon the company the onus of shewing that modern and efficient appliances were used, and the first question is: has it discharged that onus? The plaintiff's evidence pointed to locomotive 139 as the one which started the fire on May 23. The evidence shews that this particular locomotive was in the shops on May 5, 1910, and was found to be "O.K." It was not in again until May 31, 1910. The entry on that day is, "new netting door put in." This netting door is part of the spark-arresting apparatus. The obvious inference is that the netting-door was found to be defective and was replaced by a new one. The defendant's boiler inspector attempted to get rid of this inference by stating that he had taken out the door to permit a workman to enter for the purpose of fixing some steam-pipes, and when he went to put it on again he found it damaged by something having fallen on it after it had been

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taken out. For this reason, he says, he put on a new door. He does not say what fell upon the door to damage it; and, moreover, it is very singular that although, according to this witness, the steam-pipes alone were defective and required repair, the record says nothing about repairs to steam-pipes, but mentions only the new netting-door. I cannot accept the evidence of this witness as satisfactorily accounting for the putting on of a new netting-door. I believe the true explanation to be that the old door was found to be defective and that is why the new door was put in. I find, therefore, that the defendants have failed to shew that they used efficient appliances to prevent the emission of sparks.

Then, was the defendant company guilty of any other negligence? The evidence discloses that the right-of-way across the timber berth No. 974 was covered with dead, dry grass, weeds, and other unnecessary combustible matter. No attempt was made by the company to comply with sec. 297 of the Railway Act, which requires it to "at all times maintain and keep its right-of-way," free "from such matter." The evidence proves beyond question that the defendant had neglected this statutory duty. The fire originated in the combustible material which the company unlawfully allowed to accumulate on its right-of-way. Before the enactment of sec. 298 it was held to be common law negligence for a railway company to permit combustible material to remain on its right-of-way: *Flannigan* v. *C.P.R.*, 17 O.R. 6; *Rainville* v. *G.T.R.*, 25 A.R. (Ont.) 242, 1 Can. Ry. Cas. 113. Under a general statute very similarly worded the same was held in *Schwartz* v. *Halifax & S.W. R. Co.*, 11 D.L.R. 790, 15 Can. Ry. Cas. 186, 47 Can. S.C.R. 590. That noncompliance with the requirements of sec. 297 is negligence on the part of the company was held by the Privy Council in *Blue* v. *Red Mountain R. Co.*, [1909] A.C. 361, 9 Can. Ry. Cas. 140. This issue must also be found against the company.

The defendant company denies the plaintiff's ownership of the logs burned and therefore his right to recover damages for their destruction. It is pointed out that the several licenses to cut timber on berth 974 were issued in the name of Shaw Brothers, and that although the timber dues and ground rent were paid to the Government by the plaintiff the receipts therefor were issue[illegible]

in the name of Shaw Brothers, the licensees. It is further pointed out that a license cannot be assigned without the consent of the Minister of the Interior, and that no such consent was ever obtained. The last license issued for this berth expired on April 30, 1910, and the fire occurred on May 26, 1910. The license vested in Shaw Brothers, subject to the performance of the conditions named therein, the right of property in the timber upon this berth, and gave them the right to take and keep exclusive possession of the land during its continuance. Shaw Brothers sold the timber to the plaintiff and gave him the right to enter and take it. All the conditions mentioned in the license, and the regulations of the department, were complied with. Although no assignment of the license had been made to the plaintiff, the officers of the Department of the Interior were well aware that the lumbering operations upon this berth were being carried on by him for his own benefit. The defendants rely upon *Booth* v. *McIntyre*, 31 C.P. 183, as shewing that the plaintiff has no title. In that case Booth, the licensee, had, as here, sold to one White the right to take the timber, but the transfer to White was not proved. The action was for cutting and taking the standing timber, and the Court held that Booth had a title to maintain the action. It does not decide that White might not have maintained an action against McIntyre for taking logs which he had cut and skidded under his agreement with Booth, and therefore it is not in point. Shaw Brothers had a right to sell the logs to the plaintiff. It can make no difference that by the terms of the sale the plaintiff was to do the lumbering. It may be that an action of trespass for injury to the standing timber could be brought by Shaw Brothers, the licensees, alone, but the logs when cut became the personal property of the plaintiff, and for their destruction he has a right to maintain an action.

As to berth No. 1597, it is objected that the license period began on May 1, 1910, and the logs claimed for were cut on this berth before that date, *i.e.*, from February 9, 1910, to April 30, 1910. According to the Crown timber office regulations every license shall expire on April 30 next after it was granted. The plaintiff bought berth 1597 on February 9, 1910, and for the broken period between that date and April 30 the Crown timber agent accepted ground rent with the knowledge and intention that the plaintiff should go into possession and commence cutting.

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The plaintiff was at the time of the fire lawfully in possession of the logs burned, as owner. It is true the license for 974 had not been renewed at the time of the fire, but the ground rent had been paid for the year ending April 30, 1911. The plaintiff was in occupation of the berth and in actual possession of the destroyed logs with the consent of the licensee and with the knowledge of the officers of the Department of the Interior. The mills and machinery erected on the limit were the property of the plaintiff, and they were being occupied and operated exclusively by his servants. Possession, in itself, as I understand the law, gives him a sufficient title as against a wrongdoer. In *Jeffries* v. *Great Western R. Co.*, 5 El. & Bl. 802, Lord Campbell said:—

> I am of opinion that the law is that a person possessed of goods as his property has a good title as against every stranger and that one who takes them from him having no title in himself is a wrong doer and cannot defend himself by shewing that there was title in some third person, for as against a wrong doer possession is title.

In *The Winkfield*, [1902] P. 42, the Master of the Rolls said:—

> It is not open to the defendant being a wrong doer to inquire into the nature or limitations of the possessor's right and unless it is competent for him to do so the question of his relation to, or liability towards the true owner cannot come into discussion at all and therefore as between those two parties full damages have to be paid without any further inquiry.

Both of these quotations were cited with approval in *Glenwood Lumber Co.* v. *Phillips*, [1904] A.C. at 410. The only party who could dispute the plaintiff's title to the logs burned is the Crown. The defendant cannot set up the *jus tertii* as a defence.

The defendant further contends, as to the logs cut on 1597, that as these logs were brought on to and piled on 974 and were there burned the defendants are not liable. In support of this objection counsel relies upon *Fraser* v. *Pere Marquette*, 18 O.L.R. 589, 9 Can. Ry. Cas. 308. There it was held that marsh hay cut and baled at a distance from the railway and then brought and piled on the property of another person along a siding of the defendants to await shipment did not come within the term "crops" as used in the statute as it then stood. Since then the section has been amended by substituting the words "any property" for "crops, etc." I think this objection also fails.

The next question raised by the defendants is as to the effect of the siding agreement before referred to. This agreement is dated May 1, 1909, and is executed by the defendants as parties

of the first part and by the plaintiff as party of the second part. The essential parts of the agreement are as follows:—

Whereas the party of the second part is mentioned in a *lumber business* situate *at Greenbush* in the Province of Saskatchewan, and *near* the railway of the company and desires to have a railway siding built *connecting said premises* with the said railway on the terms hereinafter mentioned, which the railway company has agreed to:

Now therefore, it is hereby mutually agreed between the said parties as follows:

1. The railway company covenants and agrees that the party of the second part may construct a siding *connecting* with the said railway as shewn on plan hereunto annexed, etc.

The annexed plan shews a spur track connecting at a point on the railway, roughly speaking, about 900 feet east of the bridge over the Greenwood River, and running south-west a distance of about 3,000 feet to a point near the river. This is the point at which the plaintiff's mills were located.

Clause 6 of the siding agreement is as follows:—

That the railway company shall not be responsible for any damage or injury to the said siding or *to the buildings, fences or other property whatsoever* of the party of the second part, or of any other person or persons whomsoever *in or upon the said buildings and premises, by fire or spark communicated from any locomotive* or car of the railway company, or by any other cause, or for any other injury which may be done to such buildings, fences, property or siding by any locomotive, car or train of the railway company, or for any loss of the contents of any car which may have been placed on the said siding for the party of the second part, whether such damage, injury or loss be *caused by defects in* the plant or machinery of the railway company, or *by the negligence or default of its agent or employees or otherwise howsoever;* and the party of the second part will hold the railway company harmless against all claims of any person or persons whomsoever for damages or injuries to or loss of any car or property which may be in or upon the said siding, buildings or premises; the assumption by the party of the second part of the risk of such damage or loss and of the same being caused by defects in the plant or machinery of the railway company or by the fault or negligence of its agents or employees, is one of the considerations for the execution by the railway company of this agreement, and such execution would not have taken place without such assumption. The party of the second part will indemnify the railway company from all loss of or injury to any of its property or the contents of any of its cars while in or upon any portion of the said siding, buildings and premises, caused otherwise than by the negligence of the railway company, its agents or employees. The party of the second part will compensate the railway company for all loss or damage caused to it or its plant or rolling stock by any default of the party of the second part in the performance of any of the conditions contained in this agreement.

The contention of the defendant company is that, even if the

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logs destroyed were those of the plaintiff and the fire which consumed them was started through the defendant's negligence, the company is released from responsibility by the terms of this clause of the agreement.

The railway line intersects berth 974 about 2½ miles from the southern end. About half way across the berth, or 1½ miles from each side, the plaintiff's mills were located, a short distance south of the railway. The agreement recites that the plaintiff is interested in "a lumber business situate *at* Greenbush in the Province of Saskatchewan and *near* the railway of the company, and desires to have a railway siding *connecting said premises* with the said railway." The "*premises*" which it is desired to *connect* with the railway is a lumber business situate *at* Greenbush *near* the railway. The plaintiff owned the mills, but he did not own the timber berth crossed by the railway. The title to the berth was in Shaw Brothers. The plaintiff's only right as against them was to cut and take the timber for his own benefit. When the trees were severed they became his property, but not before. Manifestly the "premises" here referred to consists of the plaintiff's mills and their immediate surroundings, because, apart from the cut logs, the plaintiff had title to nothing else. When the agreement speaks of "connecting said premises with the said railway," it could not have been in the contemplation of the parties that the portion of the timber berth to the north of the railway on the side remote from the mills was included in the term premises. Further, the premises referred to are described as "*at*" Greenbush "*near*" the railway. The use of these terms is inconsistent with an intention to include the whole timber berth within the purview of the term "premises" as used.

Clause No. 6 provides that the company

> shall not be responsible for any damage or injury to the said siding, or to the buildings, fences or other property whatsoever of the party of the second part . . . in or upon the said buildings and premises by fire or sparks communicated from any locomotive or car of the railway company, or by any other cause, etc.

The company is not to be responsible for damage by fire: (1) to the siding; (2) to the buildings; (3) to the fences; (4) to any other property whatsoever in or upon the "said buildings and premises." The terms "other property whatsoever" is no doubt wide enough to include the logs and camp outfit destroyed. But

the destroyed property was not "in or upon the said buildings and premises," and consequently the agreement does not, as I construe it, exempt the company from responsibility for its loss.

The further objections raised that the property destroyed, having been in the Provi ce of Saskatchewan, out of the jurisdiction of this Court, this Court has no power to entertain this action. The action here is for the negligent destruction by fire of the plaintiff's property. Such a cause of action is transitory and may be maintained anywhere: *Brereton* v. *C.P.R.*, 29 O.R. 57; *Tytler* v. *C.P.R.*, 26 A.R. (Ont.) 467.

It is lastly objected that the plaintiff was guilty of contributory negligence. The negligence charged against the plaintiff is that he did not dispose of the tree-tops and branches in such a way as to prevent as far as possible the danger of fire. The license requires the licensee to do this "in accordance with the directions of the proper officers of the Department of the Interior." The evidence does not disclose that any directions were given by any officer of the Department of the Interior as to the disposition to be made of "the tree-tops, branches and other debris of the lumbering operations." As a fact, the tree-tops and branches were not destroyed by the plaintiff, but were left on the ground. There is no evidence upon which I could find that the plaintiff's method of dealing with the debris of his lumbering operations was not in accordance with the directions of the officers of the Department of the Interior. It is not possible, therefore, to hold that the plaintiff was negligent in leaving these tops where he did leave them. The cases cited in MacMurchy & Denison's Railway Acts, at 498, seem to shew that permitting inflammable material to lie close to the railway is not evidence of contributory negligence.

I am of opinion that the plaintiff is entitled to a verdict for all the damage he has sustained by the fire. As previously stated, I think the plaintiff should, in the absence of satisfactory evidence of mistake, be held to the statement made in his sworn return to the Crown timber agent in December, 1910, of the number of logs destroyed by the fire. The evidence given at the trial would, in the absence of these statements, have convinced one that the number of logs destroyed were greater than there given. I have, however, heard no evidence which convinces me that the plaintiff

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made any mistake when compiling these returns, and the probabilities are that these returns made seven months after the event were more correct than the recollections of the witnesses speaking five years afterwards. I find, therefore, that the number of logs of the cut of 1909-10 on berth 974 destroyed by the fire were 48,502. Of those cut on 1597 during the same period there were 14,885 destroyed. In addition there were destroyed at landing No. 6 of the cut of 1908-9, 5,000 logs, making a total of 68,387 logs destroyed.

The result of the plaintiff's operations shews that 1,000 feet of lumber was obtained from every 21.6 logs. The defendant's estimate of the number of logs required to produce 1,000 feet was slightly more favourable to the plaintiff. Accepting the plaintiff's figures as correct, the 68,387 logs would have produced 3,161,434 feet of lumber. The value of this lumber on the landings was $13.04 per thousand feet. According to the plaintiff's evidence 10,500 of the logs destroyed were on skidways in the bush. The cost of delivering these logs on the landings was placed at $1 per thousand feet. These 10,500 logs contained 486,111 feet of lumber.

The 5,000 logs of the cut of 1908-9 were not as valuable as the other logs, having been to some extent damaged by worms. I estimate the value of the lumber from these logs at $10 per thousand feet.

The plaintiff's loss I find to be as follows: 2,443,842 feet of lumber worth $13.04 per M., 486,111 feet of lumber worth $12.04 per M., 231,481 feet (5,000 logs) of lumber worth $10 per M. This totals an a nount slightly in excess of $40,000, to which must be added $1,000 for camp outfit, making a total of $41,000.

There will be a verdict for the plaintiff for $41,000 and costs of suit. The action was of unusual importance and difficulty, and I therefore direct that costs ought to be taxed without regard to the statutory limit of $300. There will also be a fiat for costs of examination for discovery.

*Judgment for plaintiff.*

## POWELL v. CROW'S NEST PASS COAL CO.

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*British Columbia Supreme Court, Macdonald, J. July 12, 1915.*

1. MASTER AND SERVANT (§ V—340)—WORKMEN'S COMPENSATION—SERIOUS NEGLECT OF SERVANT—AFTER-CONDUCT.

Sec. 2 (*e*) of the Workmen's Compensation Act (B.C.) refers to the exemption from liability through an injury to a workman attributable to his serious neglect at the time of the accident, and does not apply to the after-conduct of the injured in his neglect to treat the injuries sustained.

2. MASTER AND SERVANT (§ V—340)—WORKMEN'S COMPENSATION—INJURY TO EYE—AGGRAVATION—INJURED'S NEGLECT TO TREAT.

The neglect of an injured servant to treat an injury to his eye does not affect the liability of the employer, unless it has aggravated the injury so, that the condition of the injured is no longer due to the injury caused by the accident, but arises from the neglect or unreasonable conduct of the injured.

3. MASTER AND SERVANT (§ V—340)—WORKMEN'S COMPENSATION—FINDINGS OF ARBITRATOR—REVIEW.

The Workmen's Compensation Act (B.C.) only enables the arbitrator to state a case for a decision on a question of law, and where the arbitrator finds only upon the facts his findings are not open to review, unless there is no evidence to support them.

[*Armstrong* v. *St. Eugene*, 13 B.C.R. 385; *Ferguson* v. *Green*, [1901] 1 K.B. 25, referred to.]

Statement

STATED case under the Workmen's Compensation Act.

*S. S. Taylor*, K.C., for applicant.

*W. S. Lane*, for respondent.

Macdonald, J.

MACDONALD, J.:—This is a special case submitted for decision by His Honour Judge Thompson, acting as an arbitrator under the Workmen's Compensation Act. It appears that Frank Powell, the applicant, in the course of his employment with the respondent company was injured by a piece of coal striking him in the eye. He was treated for his injury by the doctor employed by the Union to attend on workmen employed by such company. The doctor treated him for three days at his office, though the applicant says that there were only two visits for that purpose. This contradiction is immaterial however. The fact is that either from the second or third day the applicant did not attend at the doctor's office until the ninth day after the accident. In the meantime the cornea of the eye had become so diseased that the eyesight could not be saved, so that the applicant has permanently lost the use of one eye, and is in danger of losing the sight of the other. He is quite unable to

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work. The respondent company paid compensation for a time and then ceased paying some eight months after the accident, taking the ground that their liability had ceased. The arbitrator found that the accident arose out of or in the course of the applicant's employment and was not caused by his serious and wilful misconduct, or serious neglect. Assuming that, in any event, the injury would have incapacitated the applicant from work for more than two weeks, then the respondents became liable to pay compensation under the Act on account of the accident. The question is to what extent did such liability exist. Had the liability terminated at the time when the respondents objected to make payment of further compensation? Counsel for the respondents admitted in his argument that the onus rested upon the employer of shewing such a break in the chain of causation as would relieve the employer from further liability. The doctor was engaged by the applicant and not by the respondents. It is found that he believed that the applicant would come to his office for treatment while the applicant, on the contrary, believed that the doctor would attend at the applicant's house. Then there is the finding of the arbitrator that "had the treatment continued the eye would, in a short time, have healed, and the applicant been able to resume his work," also, "that the man's present condition is owing to the non-treatment of the eye during the six days when he did not visit the doctor." There is the further finding that the mistake which resulted in non-treatment arose out of a misunderstanding between the doctor and the applicant and the applicant was guilty of "serious neglect in not attending upon the doctor at his office." The questions then submitted are as follows:—

(a) Am I right in applying the provisions of the Act as to serious neglect to the after-conduct of the applicant?

With reference to this question I do not think that the words "serious neglect" in sub-sec. (c), sec. 2 of the Act apply to the after conduct of an applicant. They refer to the exemption from liability through an injury to a workman attributable to his serious neglect at the time of the accident, so this question should be answered in the negative.

The other questions submitted are:—

(*b*) Is there any evidence to support my findings that the applicant's present condition is owing to the non-treatment during the six days when the doctor did not attend upon him?

(*c*) Is there any evidence to support my findings that the applicant was guilty of serious neglect as to the treatment of his eye?

When this matter first came before me as a stated case, it was agreed by both counsel engaged that the questions then submitted did not fully cover the points that were apparently intended to be dealt with. The stated case as submitted was consequently referred back to the arbitrator with certain directions as to supplementing his findings. These directions have not been fully complied with; but I think it better to deal with this important and long delayed matter on the material now before me.

The applicant had come for treatment to the doctor's office and with such a delicate organ as the eye one cannot assume that he would not be greatly concerned as to its condition and means to be taken for its cure. The arbitrator has found, however, that he misunderstood the doctor's directions; that there was a mutual misunderstanding, resulting in non-treatment for the period mentioned. If such non-treatment caused the deplorable loss of the eye, then the neglect on the part of the applicant to attend the doctor was serious. Subject to this qualification, I think there was evidence to support the finding of the arbitrator in question (*c*) and it should be answered in the affirmative. Such action or neglect of the applicant does not affect the liability of the employer unless it has aggravated the injury so that the condition of the applicant is no longer due to the injury caused by the accident, but arises from such neglect or unreasonable conduct on his part. Even if the arbitrator had found that the chain of causation from the accident was broken by neglect of the doctor, I do not think this would affect the question. The employer is not responsible for the actions of the doctor engaged by the workman: *Vide Humber Towing Co.* v. *Barclay*, 5 B.W.C. Cases, 142 at 143, Cozens-Hardy, M.R.:—

In this case we have been asked by Mr. Owen to say not only that the employer is liable in the words of the act for personal injury by accident arising out of and in the course of the employment, but that he is an insurer of the medical man, the chemist, and the nurse who attended the

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man, and is liable in the event of any of them being guilty of gross negligence, which gross negligence might be found as a fact to be the real cause of the disability at the time the matter came before the County Court Judge.

It thus follows that the answer to question (*b*) determines whether the finding referred to in question (*c*) has any bearing upon the respondent's liablity. To put it shortly—if the applicant would, as a result of the accident, have lost his eyesight, even though treated during the interval, then it is immaterial whether the applicant was neglectful or unreasonable, or not. As in *Humber* v. *Barclay, supra,* the issue here is as to whether the applicant's present condition was due to the original accident or to his subsequent negligence, or that of the doctor. The onus of shewing that the subsequent neglect brought about such condition rests upon the respondents.

> There was an accident, and it is for the employers to shew that something has happened, the result of which is that the loss of the finger is not due to the accident. The burden is upon the employers to break the chain of causation. In a case like this it seems to me that it is impossible for this Court to say there was not evidence upon which the learned County Court Judge was entitled to say that the burden of proof was not discharged, that the original liability arising from the accident remained upon the employers, and that the workman was therefore entitled to compensation.

Cozens-Hardy, M.R., in *Marshall* v. *Orient Steam Nav. Co.*, [1910] 1 K.B. 79, at 83. Fletcher Moulton, L.J.S.C., at p. 85:—

> I was not throwing any doubt on its being necessary to shew that the continued incapacity was due to this unreasonableness. That was taken for granted throughout our judgments. All that I was pointing out was that the reasonableness is not the abstract reasonableness of the operation, but the reasonableness of the conduct of the man. For these reasons I am of opinion that this case is completely covered by authority. *Primâ facie* the accident was the cause of the loss of the finger. If the owners could have shewn that the loss of the finger was not due to the accident, but was due to the unreasonableness of the man in refusing to submit to the operation—a refusal found to be unreasonable—they would have succeeded, but they have failed to prove that.

Here the arbitrator has found that the present condition of the applicant is owing to the non-treatment of the eye. If such finding be sustained, then the onus cast upon the respondents has been discharged and it is freed from further liability. This is a question of fact. Under the English Act the Court can deal

with questions of fact and also mixed questions of law and fact. It is clear that where the arbitrator finds only upon the facts his finding is not open to review, unless there was no evidence to support such finding: *Ferguson* v. *Green*, [1901] 1 K.B. 25. The British Columbia Act only enables the arbitrator to state a case for a decision on a question of law, so the matter must be considered in the light of the distinction between the two acts. The arbitrator not only finds the facts but also the proper inferences to be drawn therefrom: *Armstrong* v. *St. Eugene*, 13 B.C.R. 385. It is necessary for the applicant to shew that the finding in this question was wrong as a matter of law; in other words, that the arbitrator, without any facts or proper inferences from fully established facts, found that the non-treatment of the eye brought about its destruction. My attention has been drawn to certain portions of the evidence in support of the contention that such a result occurred. I will not deal fully with such evidence but only that portion of the doctor's which seems most pertinent. After referring to the treatment during the first visit of the applicant and the instructions given for bathing and other applications, he then speaks of the condition of the eye at the time of the second visit:—

Q. Did he come back? A. Yes, he came back and the ulcer looked decidedly better and I was very much pleased with it.

Q. Did you treat it the next day? A. Yes, I applied the iodine next day. Did not have to curette. On the third day it was healing rapidly looking as if it would be nearly healed in two or three more days.

The doctor then stated that he was quite positive that he told the applicant as to coming back the next day. The misunderstanding, already referred to, occurred, so that the treatment deemed necessary by the doctor did not continue. The following appears:—

Q. What was your opinion, doctor, on the third day as to the nature of his injury, its probable duration. A. I was very pleased indeed, because if there is one thing I do dread it is spreading out of the cornea. If it keeps on spreading you cannot get hold of it.

He then referred to the lapse of time and that the applicant did not come to his office for about a week. He then found that he had an abscess in the cornea and if it healed he would never have sight in that eye again. He found fault with the appli-

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cant who could not speak English, and directed his conversation to the secretary of the Union (Burrell) who was present, and said:—

It is a terrible thing, that man has lost his eyesight, and it seemed to me an awful thing because so unnecessary.

These words are stated as they appear in the evidence, but it is to be noted that the latter portion could be treated more as a statement of the doctor then being made to the arbitrator than as something he had mentioned to Burrell. The evidence shews that the applicant was admitted to the hospital but all efforts to save the eye proved fruitless. Bearing in mind that the onus rested upon the respondents of satisfying the arbitrator that the non-treatment had the effect indicated, I might have come to a different conclusion. He was, however, the tribunal appointed to decide the matter. Applying even the test invariably adopted with respect to juries I cannot say that his finding was wrong in the sense that as a reasonable man he should have decided otherwise. In considering an arbitrator's finding Lord Loreburn, in *Lendrum* v. *Ayr Steam Shipping Co.*, [1914] 84 L.J.P.C. 1, said:—

When the question is whether or not an arbitrator as a reasonable man could arrive at a particular conclusion, I find that in some instances Courts have held that he could not, while some of the Judges have actually agreed to the conclusion . . . I shall always be slow to say that no reasonable person could think differently from myself.

Under these circumstances I do not think the finding of the arbitrator should be disturbed and question (*b*) should be answered in the affirmative. The respondents are entitled to their costs.

*Case dismissed.*

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ALTA.

S. C.

## BIG VALLEY COLLIERIES v. MacKINNON.

*Alberta Supreme Court, Hyndman, J. August 16, 1915.*

1. MINES AND MINERALS (§ II A—28)—FORFEITURE OF COAL LEASE—INVALID NOTICE—INACCURATE DATE.

Forfeitures are regarded with disfavour by the Courts and their upholding will be avoided even for trifling reasons; therefore an inaccuracy in the reference to the date of a lease is sufficient to invalidate the notice of forfeiture.

Statement

APPLICATION for a declaration of forfeiture.

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Hyndman, J.

*O. M. Biggar*, K.C., for appellant.

*S. E. Bolton*, for respondent.

HYNDMAN, J.:—I have come to the conclusion that this application ought to be dismissed on the ground that the notice of May 27, 1915, is not sufficient to effect a forfeiture. The authorities seem to be to the effect that the Courts do not look with favour upon forfeitures and will take advantage of even trifling reasons to avoid upholding them.

In this case there are several errors in the notice referred to, namely: (1) The date of the lease is stated to be January 11, 1915, whereas it should have been January 8, 1915. (2) The names of the parties to the lease are stated to be between Big Valley Collieries Ltd. and Hugh G. MacKinnon and Consumers' Co-operative Coal Co. Ltd., instead of between Big Valley Collieries Ltd. and Hugh G. MacKinnon. (3) The notice claims payment for royalty from January 11, to the end of April, whereas, under the provisions of the lease, the royalties are payable on the 10th day of each month, not at the end of each month. The lease further goes on to state that the "Big Valley Coal Co. Ltd." will, at the expiration of one calendar month, etc., determine this demise of the property described in the above-mentioned lease, the "Big Valley Coal Co. Ltd." evidently being intended to refer to Big Valley Collieries Ltd.

In *Johnson* v. *Lyttles Iron Agency* (1877), 5 Ch.D. 687, James, L.J., at 694, says:—

> It was the established rule of the Court of Chancery and of the Courts of Common Law that no forfeiture of property could be made unless every condition precedent had been strictly and literally complied with. A very little inaccuracy is as fatal as the greatest.

Here the notice is inaccurate. It is therefore bad, and the forfeiture is invalid. This case is stated as being the law by Sterling, J., in *Jackson* v. *Northampton Street Tramways* (1887), 55 L.T. 91, in which he says:—

> As I read the law in *Johnson* v. *Lyttles Iron Agency*, in order that the notice may be made the basis of a forfeiture it is necessary that every condition required by the statute or contract should be strictly complied with. That was a case of the forfeiture of shares under the Companies Act, 1862, and in that case, as in this, the notice claimed too much.

And further on in the judgment he says:—

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Well then, if in order to produce a forfeiture every condition must be strictly and literally complied with, the question I must put to myself is, is this notice an accurate notice. The question is not whether the parties have understood or have misunderstood it. I have come to the conclusion that this notice is not accurate. I am, therefore, of opinion that it is not a notice which can be relied on for a forfeiture.

In the case of *Great West Lumber Co.* v. *Wilkins*, 1 A.L.R. 155, the notice of cancellation of the agreement for sale erroneously stated it to be March 14, 1906, instead of March 12, 1906. There were other reasons why Beck, J., decided against the validity of the notice, but, on this particular point, he says, p. 161:—

I think, too, that the inaccuracy in the reference to the date of the agreement is sufficient to invalidate the notice.

On the authority, therefore, of the above cases I hold that the notice given by the Big Valley Collieries Ltd., dated May 27, 1915, being inaccurate as above mentioned, is invalid. The application is therefore dismissed with costs.

*Application dismissed.*

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SASK.

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## CAN. NORTHERN EXPRESS CO. v. TOWN OF ROSTHERN. CAN. NORTHERN TELEGRAPH CO. v. TOWN OF ROSTHERN.

*Saskatchewan Supreme Court, Haultain, C.J., Lamont, and McKay, JJ. July 15, 1915.*

1. TAXES (§ III H—156)—CORPORATION TAX—BUSINESS TAX—SIMILARITY.

Sec. 18 of the Corporation Taxation Act (Sask.) prohibiting the imposition of any similar tax on any company or corporation paying the corporation tax, has no reference to an assessment of a company for a business tax.

[*Dominion Express Co.* v. *City of Regina*, 4 S.L.R. 34; *Dominion Express Co.* v. *City of Brandon*, 20 Man. L.R. 304, referred to.]

2. TAXES (§ III J—165)—RECOVERY BACK—OVER-ASSESSMENT—MODE OF OBJECTION.

Where a municipality has the right under statute to impose a tax, and the person assessed in respect thereof does not appeal against the *quantum* of the assessment, he cannot in an action to recover the taxes which he was compelled to pay, be heard to say that he was over-assessed.

3. TAXES (§ III B 2—133)—ASSESSMENT AND VALUATION—EXPRESS AND TELEPHONE COMPANIES—FINANCIAL INSTITUTIONS.

Neither an express nor a telegraph company can be classed as "a bank, loan company or financial institution" within the meaning of sec. 302 (2) of the Towns Act (Sask.), providing the mode of their assessment for taxation.

Statement

APPEAL by the plaintiff from the District Court Judge in an action for taxes.

*J. N. Fish*, K.C., for appellants.

*H. V. Bigelow*, K.C., for respondent.

The judgment of the Court was delivered by

LAMONT, J.:—This action was brought by the appellants against the Town of Rosthern for $219.34, being the amount of taxes paid by the appellants, under protest, in respect of the "business assessment tax" levied against the appellants in the years 1911, 1912, and 1913.

The appellants were doing business in the town in each of these years. Their respective businesses were carried on in the station building of the Canadian Northern Railway Company, and the agent of the railway company was also the agent of and carried on the business of both appellant companies.

In the year 1911, the Telegraph Company was assessed for 208 square feet of floor space at $8 per foot, making an assessment of $1,664, on which the taxes, including a penalty, amounted to $21.57. The assessment roll for 1912 shews an assessment against the Telegraph Company of $8,624 which, according to a business assessment book kept by the town, was made up by alloting 208 square ft. to the telegraph business and 120 square ft. to the express, both at $8 per foot, and 1,200 square ft. to freight at $5 per foot. The taxes on this assessment amounted to $142.29.

In 1911 and 1912 the Express Company was not assessed. In 1913 both companies were assessed; the Telegraph Company for $750, being 50 square ft. at $15 per foot, and the Express Company for $1,500 being 100 square ft. at $15 per foot. The amount of taxes levied against the Telegraph Company in 1913 was $13.50, and against the Express Company $27.

To the Express Company's taxes were added the arrears which had, in 1911 and 1912, been levied against the Telegraph Company. This is clearly an error, these arrears should have been added to the Telegraph Company's taxes.

Neither of the appellant companies ever appealed to the Court of Revision against the assessment made. The action was tried before the Judge of the District Court, who gave judgment in favour of the appellants for $106.66; being the taxes

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levied against the Telegraph Company in 1912, in respect of 1,200 square feet allotted to its freight business, as the business of handling freight clearly belonged to the railway company which was not assessable.

In other respects he confirmed the taxes levied by the town, but without costs to either party. From that decision the appellants now appeal.

For the appellants it is contended that the imposition of the business tax is illegal, because: 1st. It is a similar tax to that imposed by the Corporation Taxation Act, and 2nd. Even if it is not a similar tax, that, so far as the Telegraph Company is concerned, the only tax to which it is liable is a specific franchise tax, not a business tax.

(1). Sec. 18 of the Corporation Taxation Act reads as follows:—

> 18. Where a company or corporation pays the tax by this Act imposed no similar tax shall be imposed or collected by any municipality in this province and no company made liable to taxation by this Act nor any of its agents shall require any license, authorization or permit of any municipality for doing business in the municipality or for establishing agencies therein.

For the reasons given by my brother Newlands in *Dominion Express Co.* v. *City of Regina*, 4 S.L.R. 34, and by the Manitoba Court of Appeal in *Dominion Express Co.* v. *City of Brandon*, 20 Man. L.R. 304, I am of the opinion the business tax imposed upon the appellants is not similar to the tax imposed by the Corporation Taxation Act.

(2). Sec. 169, sub-sec. 37 of the Towns Act reads as follows: The council of every town may pass by-laws for:—

> (37). Granting any special franchise subject to such regulations as the council may make and subject to the ratification of the by-law by two-thirds of the burgesses voting thereon as hereinafter provided, but no such special franchise shall be granted for a longer period than ten years.

Sec. 302, sub-sec. 4 provides that:—

> (4). The owner of a specific franchise shall not be assessed in respect of business or income, but in addition to and assessment on land shall be assessed for the actual cost of the plant and apparatus less a reasonable deduction for depreciation.

In my opinion, the special franchise referred to in sub-sec. (4) is a special franchise granted by the town, and has no refer-

ence to rights and privileges granted by Parliament or the Legislature. The town had, therefore, the right to assess both appellant companies for the business tax. Whether the assessment should have been a joint or a separate assessment, or whether either company was assessed for too large a floor space, we need not consider; if the appellants had any complaints in these respects they could have appealed against the assessment. Where the town has, under the Act, the right to impose the tax, which, in fact, it did impose, and the person assessed in respect thereof does not appeal against the *quantum* of the assessment, he cannot in an action to recover the taxes which he was compelled to pay, be heard to say that he was over-assessed.

So far as the taxes imposed upon the Telegraph Co. in 1911 and 1912 are concerned, in my opinion they were validly imposed. The only objection that can now be raised to the taxes imposed in 1913 is that the town assessed both companies at $15 per square ft.

Sec. 302, sub-sec. 2 reads:—

> The mode of assessing businesses shall be as follows. The assessor shall fix a rate per square foot for the floor space . . . of such building or part thereof used for business purposes . . . and may fix a different rate for different classes of business . . . such rate shall not exceed $8 per square foot, except in case of banks, loan companies, and other financial institutions, in which cases such rate shall not exceed $15 per square foot.

Neither of the appellant companies can be classed as "a bank, loan company or financial institution," and therefore the town had no authority to assess them at more than $8 per foot. Having fixed the floor space used by the appellants at 50 and 100 square ft. respectively, and they not having appealed against that allotment, it must stand; but, as the town had no statutory authority for imposing a rate against the appellants of more than $8 per square foot, the assessment in excess of that is illegal and cannot be supported, and the taxes paid in respect of such excess, which, as I figure it amounts to $18.90, should be returned to the appellants.

The appeal should, therefore, be allowed, and the judgment of the Court below varied by increasing the amount awarded to

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the appellants by the sum of $18.90. As, however, this point was not argued before us, no costs of appeal should be allowed.

For the appellants it was also contended that, as they had succeeded in the Court below, the learned trial Judge should have awarded them the costs of the action. Costs were refused to them because the only point upon which they succeeded was in respect of an assessment for freight business, which was clearly no concern of either of the appellants and which would have been struck out had they appealed to the Court of Revision. As a matter of fact, they having been assessed for 1,200 square ft. and not having appealed therefrom, I am of opinion that they might have been held liable for the taxes, for, as I have already pointed out, where the town has the right to make the assessment on which the taxes are based, an over-assessment must be appealed against or the person assessed is liable for the taxes levied in respect thereof. As, however, the trial Judge relieved the appellants of these taxes, and there is no appeal against that finding by the town, it should stand; but so far as the costs of the action are concerned, the trial Judge, in my opinion, exercised a wise discretion.

*Judgment varied.*

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SASK.

S. C.

## SPROULE v. ISMAN.

*Saskatchewan Supreme Court, Newlands, Brown and Elwood, JJ. July 15, 1915.*

1. CONTRACTS (§ III C 1—215)—VALIDITY—BIASING MIND OF PURCHASER—CORRUPT ACT.

An agreement to pay a sum of money for biasing the mind of a prospective purchaser to accept the bargain is a corrupt act and unenforceable.

[*Wyburd* v. *Stanton*, 4 Esp. 179; *Harrington* v. *Victoria Graving Dock Co.*, 3 Q.B.D. 549, followed.]

Statement

APPEAL from judgment for defendant.

*P. H. Gordon*, for appellant.

*Vrooman*, for respondent.

The judgment of the Court was delivered by

Elwood, J.

ELWOOD, J.:—The appellant brings this action as assignee of one Dorset, hereinafter referred to.

The evidence shews that the defendant had, through a real

estate dealer in Winnipeg, entered into an agreement with one Yandt for the sale to Yandt of the King's Hotel at Redvers; subject to the inspection of the hotel by Yandt. Yandt came to Redvers for the purpose of inspecting the hotel and the defendant introduced Dorset to Yandt. The latter was called as a witness on the part of the plaintiff, and, in the course of his evidence, stated that the defendant introduced Dorset to him as a lawyer at Redvers, who had been there a number of years; said he asked Dorset about the hotel, if it had been doing good business, and Dorset said it was a good proposition and that Isman had done well; that he would not really have bought the hotel but for Dorset; that he took Dorset's word for it; that he knew no one there, and that he was simply dealing with Dorset as a citizen of Redvers from whom he could gain information. The evidence further shews that, prior to this introduction, the defendant had told Dorset, in effect, that there was $500 in it for him if the sale was made to Yandt. There was no suggestion that Yandt was in any way defrauded.

*Wyburd* v. *Stanton*, 4 Esp. 179, is reported as follows:—

Assumpsit for goods sold and delivered.

Plea of the general issue, and set-off. One part of the set-off was for certain poundage and reward, before that time agreed to be paid, and then due and payable from the plaintiff to the defendant, upon and in respect of certain goods and merchandise before that time sold and delivered by the plaintiff to one James Perry Andrew, for and in consideration of the defendant's having recommended the said James Perry Andrew to buy the said goods and merchandise from the plaintiff.

Upon this being stated, Lord Ellenborough said he thought that this demand could not be supported: it was a fraud on third persons.

It was accordingly rejected.

In *Harrington* v. *Victoria Graving Dock Co.*, 3 Q.B.D. 549, it appears that the defendants contracted to pay the plaintiff a commission for superintending repairs to be executed by them on certain ships belonging to the Great Eastern R. Co. The plaintiff, at the time of such contract being made, was in a position of trust in relation to the railway company, having been employed by them, as an engineer, to advise them as to the repairs, and the contract between the defendants and the plaintiff was made, in part, in consideration of a promise that the plaintiff would use his influence with the railway company to

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induce them to accept the defendants' tender for the repairs of the ships. The jury found that the contract, though calculated to bias the mind of the plaintiff had not, in fact, done so; and that he had not, in consequence thereof, given less beneficial advice to the company as to the defendants' tender than he would otherwise have done. Held, that the plaintiff could not maintain an action for commission under the contract on the ground that, although the plaintiff had not been induced to act corruptly, the consideration for the contract was corrupt.

The principles of that case were approved in *The Queen* v. *Justices of Yarmouth*, 8 Q.B.D. 528.

Yandt never understood Dorset to be acting in any way as an agent for the defendant, but simply looked upon him as an independent citizen of the village, upon whose judgment he could rely, and, in fact, it seems to me that the intention of the introduction was to induce Yandt to so believe, and the consideration for the promise of the $500 was the advice the plaintiff was to give Yandt.

As was stated in *Harrington* v. *Victoria Graving Dock Co.*, *ante*, at 69, the tendency of such an agreement as this must be to bias the mind of Dorset, and, following the above cases, it seems to me that the agreement between Dorset and the defendant was a corrupt one and cannot, therefore, be enforced. In my opinion, therefore, the appeal should be dismissed with costs.

*Appeal dismissed.*

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ALTA.

S. C.

## TRAUNWEISER v. JOHNSON.

*Alberta Supreme Court, Stuart, J. June 30, 1915.*

1. VENDOR AND PURCHASER (§ III—35)—RIGHTS OF EXECUTION CREDITORS—PRIORITIES.

A purchaser under an instalment agreement entered into before the filing of a writ of execution against the lands of the registered vendor has a prior right to the lands as against the execution creditor.

2. VENDOR AND PURCHASER (§ III—35)—RIGHTS OF THIRD PARTIES—BONA FIDE PURCHASERS—EXECUTION CREDITOR.

An execution creditor is not a purchaser for value without notice as to rank in priority over a purchaser of the land, even though the purchaser registered no caveat.

3. EXECUTION (§ I—8)—EQUITABLE INTEREST IN LAND—LIEN FOR UNPAID PURCHASE MONEY.

A mere equitable interest in land cannot, unless authorized by statute,

be reached by a common law *fi. fa.*; and in the absence of legislation giving that right, a vendor's equitable lien for the unpaid purchase money cannot be sold on execution.

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APPLICATION to set aside an execution.

*I. W. McArdle*, for motion.

*H. D. Mann, contra.*

STUART, J.:—This is an application by a purchaser of lands under an agreement of sale for an order that an execution against the lands of the vendor, the registered owner, be declared to be of no effect as against the lands purchased. The agreement was made some time before the writ was filed in the Land Titles Office, and some payments had been made to the vendor under the agreement. After the filing of the writ, but before actual notice thereof on his part, the purchaser paid the vendor the further sum of $80. He then received notice of the writ, and he now makes the above application, offering at the same time to pay the balance of the purchase price into Court. There is, therefore, only a question of $80 involved, but though the amount is small a very important point of law is raised. The question is whether a purchaser under an instalment agreement entered into before the filing of a writ of execution against the lands of the vendor is bound to search the registry office before making each successive payment in order to protect himself. In *Merchants Bank* v. *Price*, 16 D.L.R. 104, Mr. Justice Walsh expressed an opinion on the matter which is favourable to the purchaser. The opinion of Mowat, V.C., in *Parke* v. *Riley*, 12 Grant 69, and 3 E. & A. 215, is also to the same effect, although it is largely based upon a principle, *viz.*, the impossibility at that time in Ontario of seizing by a writ of execution a mortgagee's interest under a mortgage, which would not apply now in this province since such an interest is now exigible here: rule 619. The opinion of the majority of the Court in that case was, however, based upon the fact that before the issue of the execution the vendor had assigned his interest in the purchase moneys, while Draper, C.J., expressed great doubt as to the correctness of the view of Mowat, V.C.

The matter is one of some difficulty, and I think it is quite obvious that the root of the difficulty lies in the absence of any very definite legislation as to the right to sell lands under a writ of execution. Apparently we now have nothing but r. 584, which says:—

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Every writ of *fieri facias* shall be issued against both the goods and lands of the debtor.

The old r. 364, which was statutory, did, of course, enact that a writ of execution might issue against lands. And I do not say that there is not a right to sell lands under execution, but I point out that such a right was clearly at one time looked upon as a matter of substantive law and not a matter of procedure, because both in England and in Ontario a statute was required before it could be done. Yet with us the legislation on the subject has apparently dwindled down to the bald terms of r. 584. The Land Titles Act deals only with matters of registration and the confirmation of sales, and there is no doubt that the right to seize and sell lands is assumed to exist independently of that Act. It may be that in the last resort, the law of England as it stood in 1870 may be resorted to, although at that date there was no *fi. fa.* lands in England, nor is there even now. But there is certainly no statute of our own definitely establishing the right to sell lands to satisfy a judgment. We have not the advantage of any definition of the term "lands" in any such Act, or even to throw light on r. 584. The definition of the term "land" in the Land Titles Act will certainly not apply, because the question is what the word "lands" in the writ includes, and the Land Titles Act does not interpret that.

There is no doubt that though the execution debtor was still the registered owner when the writ was filed, it would be impossible for the execution creditor to sell the legal estate in the land. The purchaser, by virtue of his agreement, had a prior right to insist that upon the payment of his money he should obtain the legal estate even though at a sheriff's sale the land might bring much more than the purchase price and so yield more to the creditor. The execution creditor is not a purchaser for value without notice even though the purchaser registered no caveat. He simply gets what he is lucky enough to catch at the time of filing his writ.

If the word "lands" in the writ of execution means "any interest in lands," then the interest of the unpaid vendor as it stood at the date of the filing of the writ would be covered by that word.

Inasmuch as old r. 364 is inconsistent with the present r. 584,

it would seem that by virtue of r. 712 the authority of old r. 364 is gone unless that old rule may be said to contain substantive law and not merely a rule of practice.

In any case, we can, of course, fall back upon 5 Geo. II. ch. 7, which enacted that

> the houses, lands, negroes and other hereditaments and real estates situate within . . . the . . . plantations belonging to any person indebted shall be liable to all just debts . . . and shall be subject to the like remedies . . . and in like manner as personal estates are seized, extended, sold or disposed of for the satisfaction of debts.

The statute is in force in Alberta, and no doubt authorizes the issue of a *fi. fa.* lands. But it gives no interpretation of "real estate" or "lands."

However, it seems to be assumed in *Jellet* v. *Wilkie*, 26 Can. S.C.R. 282, that the beneficial interest of a registered owner, though it may not be the whole beneficial interest, can be reached by execution. I refer to the passage in the judgment of Strong, C.J., at p. 290, where he says:—

> According to the ordinary rules of courts of equity, the appellant could have made his execution a charge on and have sold for the satisfaction of his judgment just what beneficial interest the execution debtor had on the lands and nothing more.

But apparently the reference is to equitable execution and not to a common law *fi. fa.* Even if a wider meaning were intended, I am inclined to think that the Court was influenced by its knowledge of Upper Canada legislation such as is referred to in Leith, Real Property Statutes, vol. 1, pp. 312-317. From this latter work it is quite apparent that as long as the only legislation in force in Upper Canada was the statute, 5 Geo. II. ch. 7, to which I have referred, a mere equitable interest could not be sold under *fi. fa.*: see *Ward* v. *Archer*, 24 O.R. 650. I notice that in *Rogers Lumber Co.* v. *Smith and Ideal Fence Co., Ltd.*, 11 D.L.R. 172, the Supreme Court of Saskatchewan assumed that the interest of a purchaser under an agreement of sale was effected by an execution against his lands.

I would, however, have little hesitation in saying that a mere equitable interest in lands could not be reached by a common law *fi. fa.* in view of the position of legislation on the subject. Section 77 of the Land Titles Act does not help at all even with the aid of the interpretation clause, because the real question arises before we reach the Land Titles Office at all.

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The fact that the debtor is registered owner of the fee simple is the only thing that gives me difficulty, but there is no doubt, as I have pointed out, that the execution creditor could not sell the fee. He might do so at law, but certainly in equity would be restrained. Then, can he sell the mere interest of the vendor, his equitable lien for unpaid purchase money? In my opinion he cannot, for the simple reason that there is no legislation which gives the right to seize such an interest under a common law *fi. fa.*

I therefore allow the application, and direct the removal of the execution, so far as it affects the lands in question, upon payment of the balance of the purchase money into Court, which the purchaser has offered to do. Possibly the debtor might have objected to this in strictness, but it would have been useless, inasmuch as a receiver could have been obtained by the creditor.

*Judgment for plaintiff.*

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S. C.

## EAST v. CLARKE.

*Ontario Supreme Court, Meredith, C.J.O., Garrow, Maclaren, Magee, and Hodgins, JJ.A. April 26, 1915.*

1. ADVERSE POSSESSION (§ I D—15)—ADVERSE HOLDING BY TENANT—PAYMENT OF TAXES AS RENT—EFFECT AS TO TITLE.

The continued and uninterrupted possession of land for the statutory period, but entered on under an agreement to pay the taxes thereon as rent, and no other rent having been stipulated for, the payments of such taxes operate as an acknowledgment of title which will prevent the Limitation Act, R.S.O. 1914, ch. 75, sec. 6 (7) from accruing.

[*Finch* v. *Gilray*, [1889], 16 A.R. (Ont.) 484, distinguished.]

2. ADVERSE POSSESSION (§ I E—22)—LIMITATIONS AGAINST MORTGAGEE—DEED ABSOLUTE IN FORM—EFFECT OF PAYMENTS.

The Limitation Act, R.S.O. 1914, ch. 75, sec. 23, is inoperative against a mortgagee or any person claiming under him, to whom the land was conveyed by a deed absolute in form but intended only as security for a loan and on which payments were being made.

3. LANDLORD AND TENANT (§ II C—23)—TENANCY AT WILL—WHAT CONSTITUTES.

The occupation of land under a verbal agreement to pay the taxes thereon as rent until a purchaser is found constitutes a tenancy at will.

Statement

APPEAL by plaintiff from the judgment of Kelly, J.

*N. W. Rowell*, K.C., and *George Kerr*, for appellant.

*J. M. Ferguson*, and *D. J. Coffey*, for respondent.

The judgment of the Court was delivered by

Garrow, J.A.

GARROW, J.A.:—Appeal by the plaintiff from the judgment

at the trial of Kelly, J., who dismissed the action. The facts appear in his reasons for judgment.

As will be seen, the judgment proceeds upon the ground that the tenancy created by the agreement that the defendant might occupy the land in question until a purchaser was found, he to pay the taxes in the meantime, as rent, was a tenancy at will. To such a tenancy sec. 6, sub-sec. 7, of the Limitations Act, R.S.O. 1914, ch. 75, would apply to bar the plaintiff's right of re-entry at the expiration of ten years from one year after the creation of the tenancy. The practical result would be the same if it should be held that the tenancy was or subsequently became a tenancy for a year, or from year to year, the lease having been by parol—see sub-sec. 6—the only difference being that under sub-sec. 6 the statutory period begins to run at the end of the first year, "or at the last time when any rent payable in respect of such tenancy was received, whichever last happened," while in sub-sec. 7 nothing is said about the effect upon the operation of the statute of the payment of rent.

I agree with Kelly, J., that the proper conclusion is, that the defendant was at the beginning, as the result of the agreement, a mere tenant at will; and, in my opinion, nothing is shewn to have subsequently occurred to alter or enlarge his title.

In *Day* v. *Day* (1871), L.R. 3 P.C. 751, on an appeal from New South Wales, the question arose upon a section not unlike our sec. 6, sub-sec. 7; and in the judgment, at p. 761, it is said: "When the statute has once begun to run it would seem on principle that it could not cease to run unless the real owner, whom the statute assumes to be dispossessed of the property, shall have been restored to the possession. He may be so restored either by entering on the actual possession of the property, or by receiving rent from the person in the occupation, or by making a new lease to such person, which is accepted by him; and it is not material whether it is a lease for a term of years, from year to year, or at will."

Accepting this as a binding statement of the law, the result seems to be to give to the payment of rent in the case of a tenancy at will the effect of a similar payment of rent under sub-sec. 6, which seems reasonable.

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The defendant paid nothing directly to the plaintiff or to her husband. What he did pay was the taxes, which he paid each year to the municipal officials. The plaintiff contends that, as there was an express agreement by the defendant to pay the taxes as rent, no other rent having been stipulated for, the amounts so paid were really paid as rent within the meaning of the statute, and so prevented the statutory bar from accruing. And the learned counsel for the plaintiff distinguished the case in this Court of *Finch* v. *Gilray*, 16 A.R. 484, referred to and followed by Kelly, J., in which it was held, overruling a Divisional Court, that in a lease providing for the payment of a sum by way of rent and a further sum by way of taxes the payment of the latter alone did not prevent the operation of the statute. Burton, J.A., at p. 488, however, expressed the opinion that the payment of a sum equivalent to the taxes would have been sufficient as a reservation of rent directly to the landlord. And a similar opinion was apparently expressed by Osler, J.A., at p. 493. But both learned Judges seemed to regard the payment of taxes, under a lease which also provided for the payment of rent, as something quite collateral or in addition to the rent, and therefore not "rent" within the meaning of that term as used in the statute. Maclennan, J.A., expressly, in the beginning of his judgment, limited his remarks to the actual case before him, namely, that of an agreement to pay the taxes, as well as, in addition, a certain sum for rent (pp. 494, 495). He then proceeds: "It cannot fairly be said that, by the express terms of the agreement, the taxes were to be paid as so much additional rent. The parties, no doubt, could have agreed to that, but I think it is not proved that they did so in this case." The learned Judge then referred to the Assessment Act, saying: "In my judgment, the tenant in this case must be regarded as having paid his taxes in discharge of his legal obligation to the municipality, and I think it is impossible for any purpose to regard it as rent received by the landlord, as an acknowledgment of title" (p. 497).

Whatever application the learned Judge's remarks concerning the Assessment Act had to the facts in that case—an application which, with the greatest respect, is to me not at present

clear—they can, I think, have no application in this case. The defendant's obligation to pay the taxes only arose upon his being placed in possession under the agreement with the plaintiff's husband, and under that agreement the defendant expressly agreed to pay the taxes, not merely as taxes but as rent, and the only rent to be paid for the use of the land. And in paying the taxes he was therefore, primarily at least, performing his part of the agreement, and the circumstance that in so doing he was also discharging an obligation incidentally imposed by the assessment law upon both tenant and owner seems to me to be of no consequence. It would, of course, be otherwise but for the agreement, for it may well be conceded that the mere payment of taxes by an occupant of land would not in itself be an acknowledgment of title or prevent the operation of the statute. And, giving full effect to the decision upon the facts in *Finch* v. *Gilray*, that the same result would follow where there is a specific reservation of another and different sum as rent, I am quite unable to see why, where no other sum is reserved, the parties may not lawfully agree that the tenant shall pay the taxes as rent, nor why the sum so agreed to be paid and paid should not for all purposes be regarded as rent. A contrary conclusion could not, I think, safely rest upon the circumstance that the payments were not to be made directly to the plaintiff but to the assessment officials. The taxes were a charge not merely upon the occupant, but also upon the landlord and his land, under which, in addition to other remedies, if the taxes remained unpaid, the land itself could be sold. If the agreement had been to pay the amount of the taxes into the plaintiff's bank, or to a dependent relative, or a creditor, no one would, I think, suggest that such a payment was not the equivalent for all purposes of a payment directly to the landlord. And I am quite unable to see a substantial difference between the cases so supposed and this.

The real question, it seems to me, is, was the payment made under circumstances which amounted unequivocally to an acknowledgment of the plaintiff's title; and, having regard to the agreement between the parties, of that there ought to be no reasonable doubt in this case.

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I am, therefore, upon the whole, of the opinion that the contention of the plaintiff's counsel that this case does not fall within the decision in *Finch* v. *Gilray* is well-founded; and that, consequently, the plaintiff ought to succeed in this appeal.

A new point was raised on the hearing before us to which I should perhaps briefly refer, namely, that the conveyance from the plaintiff's husband to William Dennis, the plaintiff's father, although absolute in form, was in fact intended to be a mortgage given to secure a loan of $1,000 by William Dennis to the husband upon which the husband paid the interest for many years, and also a part of the principal. After the death of William Dennis, his executors, on the 15th October, 1913, conveyed the land to the plaintiff—the husband, the mortgagor, consenting. And it is contended that, while the mortgagee's title was outstanding and payments being made, the statute was inoperative as against the mortgagee or any person claiming under him. See sec. 23. That result would, of course, clearly follow if the conveyance had been in form a mortgage. And I am not able to see a good reason why, where the fact is admitted or is established, as it is here by the evidence, it should not also be so in such a case as this. The defendant has no merits. He is seeking to obtain, under cover of the statute, what would not otherwise belong to him; and we are not, in such circumstances, in my opinion, called upon to be astute to find reasons for assisting him.

The case is easily, I think, distinguished from the case recently before us of *Noble* v. *Noble*, 9 D.L.R. 735. In that case a mortgagor, after his title had been extinguished under the provisions of the statute, paid off the mortgage and obtained and registered an ordinary statutory discharge, and the question was as to the effect which ought to be attributed to such a discharge under such circumstances. The majority of the Court held that the proper effect was to regard the discharge as enuring to the benefit of the person or persons then best entitled in law to the land, and not as giving to the plaintiff, who had lost his title, a new starting-point under the statute as a person claiming under the mortgagee. The conveyancing here, however, is of quite a different character. The plaintiff obtained

her conveyance, which is an ordinary deed in fee simple, directly from the legal representatives of the deceased mortgagee. The conveyance was so made, it is said, by and with the consent of her husband, the mortgagor; but that cannot, I think, affect the legal result, which is, in my opinion, to entitle her to say that she claims under the mortgage within the meaning of the cases referred to in *Noble* v. *Noble*.

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For these reasons, I would allow the appeal and direct judgment to be entered for the plaintiff for the recovery of the land in question. And the defendant should pay the costs throughout.

*Appeal allowed.*

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## VICTORIA SAANICH CO. v. WOOD MOTOR CO. LTD.

B. C.
C. A.

*British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher, and McPhillips, JJ.A. June 30, 1915.*

1. DAMAGES (§ III A 4—80)—MEASURE OF—BREACH OF WARRANTY—SALE OF MOTOR TRUCK—TONNAGE CAPACITY.

In an action for breach of warranty as to the tonnage capacity of a motor truck, the true measure of damages is not the difference in price between the truck sold and the standard of one it warranted to be, but the difference between the price paid for and its market value at the date of sale, together with the costs of repairs incurred in its consequent overloading under the mistaken belief as to its true capacity.

2. COSTS (§ I—2*d*)—ACTION FOR BREACH OF WARRANTY—COUNTERCLAIM—APPEAL AND CROSS-APPEAL.

A defendant counter-claiming for the price of goods in an action for breach of warranty of sale will not be allowed his costs where the counterclaim is undisputed and the plaintiff otherwise succeeds on all the issues of the action, notwithstanding that on appeal by the plaintiff and cross-appeal by defendant the amount of damages allowed for the breach had been reduced.

Statement

APPEAL from the judgment of Gregory, J.

*Frank Higgins*, for plaintiff, appellant.

*H. E. A. Robertson*, for defendant, respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—This is an appeal from an assessment of damages for breach of warranty that a motor truck sold by defendant to plaintiffs was a 3-ton truck. The assessment complained of was made pursuant to a judgment of this Court on a previous appeal.

The trial Judge assessed the damages under two heads. He allowed $700, the difference between the price of a standard Mack 3-ton truck and the price plaintiffs agreed to pay for the one in

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question; and also the sum of $295.25 to cover increased cost of repair of the truck over what he thought would have been the cost of repair had the truck been used as a 2-ton truck.

The plaintiffs appealed on the ground that the assessment was made on the wrong principle and the amount was inadequate.

The defendant cross-appealed on the ground that the allowance of $295.25 was not justified by the evidence. Both parties also appealed against the disposition of the costs. I think the said sum of $700 was arrived at on a wrong principle. The true measure of damages is not the difference in price between the truck in question and a standard 3-ton Mack, but is the difference between the price paid for the truck in question, namely, $4,800, and the market value of it at the date of the sale.

The plaintiffs, by their user of the truck for three weeks after they discovered that it was not as represented, thereby elected to keep it and sued upon the warranty. Had they discovered the truth at the time the truck was delivered and elected to keep it, it is manifest that all they could have recovered is the difference between the price they agreed to pay, or had paid, and the market price at that time. In my opinion the use of the truck for several months before discovery of its true capacity, and the election after that discovery, does not change the situation in respect of the question now under consideration. The use of the truck for several months without knowledge of its true capacity may have entailed expense in the way of repairs which would entitle the plaintiffs to additional damages. That is covered by the item of $295.25.

Now, the evidence in this case is that the truck was rated at the factory a 2-ton truck. The defendant contends that it was better than the standard truck; that it had been strengthened in certain parts, rendering it capable of carrying a load of three tons. There is no evidence that it was less valuable than the standard 2-ton truck. Hence it is entirely fair to the plaintiffs to take the market price of the standard 2-ton truck, deduct that from the price they were to pay for this truck, and adopt the result as the measure of damages. Now, the difference is $550—not $700, and the damages should be reduced accordingly.

It is true the defendant has not appealed against the allowance of the $700 item, but, as the plaintiffs have appealed, the matter

is open, and I ought to give the judgment which in my opinion should have been given below.

As to the item of $295.25, I cannot say that the allowance of this sum was wrong. The plaintiffs used the truck for several months under the belief that it could safely carry 3-ton loads. This mistaken belief and consequent overloading of the truck may very well have added to the cost of repairs. The learned Judge thought $295.25 a fair and reasonable sum to allow. No sum could be arrived at with any degree of accuracy. It was a matter of inference from the facts in evidence, and I am not disposed to interfere with the conclusion arrived at by the learned trial Judge.

On the main question, therefore, there should be a reduction of $150, and an aliquot part of the interest allowed on the $700.

As the whole contest in this costly litigation arose out of the defendants' breach of contract, and as it disputed its liability all through the trial and until established by the judgment of this Court, and as apart from that dispute there could be no real contest in respect of the counterclaim for the balance of the purchase price of the truck, it becomes necessary to consider what was the "event" upon which the disposition of the costs must depend.

By the order of this Court directing the new trial the costs of the action were left to be disposed of by the trial Judge; that, of course, meant according to law and not contrary to it.

The judgment appealed from purports to award to the plaintiffs the costs of the second trial and to the defendant the costs "of the first trial and counterclaim and of the counterclaim on the second trial." The general costs of the action or defence are not mentioned.

By statute costs are to follow the event except in certain cases not in point here, and subject to a power in the Court to deprive a successful party of them for good cause. Where that power is not exercised the costs are not in reality awarded by the Court but by the statute. Now, it has been decided that "event" must be read distributively so as to include where necessary one or more events, as there can be more than one in the result of a law suit: *V. W. & Y. R. Co.* v. *Sam Kee* (1906), 12 B.C.R. 1; *Myers* v. *Defries* (1880), 5 Ex.D. 180; *Hoyes* v. *Tate*, [1907]

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1 K.B. 656; and *British Westinghouse, &c., v. Underground, &c., R. Co.*, [1912] A.C. 673.

The only difficulty which presents itself in this case arises from a doubt as to whether the cross-claim of the defendant is a set-off or on the contrary is a counterclaim. If a counterclaim, then there is no difficulty in the application of the statute to the costs of this case; the plaintiffs would be entitled to the costs of the action including both trials, and the defendant to the costs of the counterclaim including both trials, and the taxing officer would under the statute tax them accordingly.

But it was contended on this appeal by defendant's counsel that the cross-claim of the defendant was a set-off, and not in reality a counterclaim, although so pleaded.

Before the Judicature Act the right of a defendant to set up a cross-claim was, apart from agreement, governed by what are commonly called the statutes of set-off which are no longer in force. A right to counterclaim in an action was given for the first time under the Judicature Act by the rules of the Supreme Court.

By the practice under the statutes of set-off no claim which sounded in damages could be the subject of set-off, nor could a claim for a liquidated demand be set-off against a claim which sounded in damages: 25 Hals. 489, and the cases there referred to. In the same volume, at p. 491, it is stated that the effect of the Judicature Act and rules on the right of set-off is open to some doubt, and a number of cases are there discussed containing conflicting *dicta*, some of very high authority.

The language of Order 19, r. 3, of the said rules which now govern set-off and counterclaim, is quite different from that of the statutes of set-off which it replaced; it reads, so far as it need be quoted:—

> A defendant in an action may set-off, or set up by way of counterclaim against the claims of the plaintiff, any right or claim, whether such set-off or counterclaim sound in damages or not, and such set-off or counterclaim shall have the same effect as a cross-action, so as to enable the court to pronounce a final judgment in the same action, both on the original and on the cross claim.

If unliquidated claims may, as appears by the language used, be the subject of set-off, then the right of counterclaim would seem superfluous, because every cross-claim could be pleaded as a

defence to an action—in other words, as a set-off pure and simple. If, on the other hand, set-off is to have the "same effect as a cross-action," it would be reduced to the status of a counterclaim, and in its strict sense and meaning would not exist, except, perhaps, as an equitable defence. If, again, the words, "shall have the same effect as a cross-action so as to enable the Court to pronounce a final judgment in the same action both on the original and on the cross-claim," mean that the cross-claim shall have the effect aforesaid merely for the purpose of enabling the Court to pronounce such final judgment, then the right of set-off, in the wide sense of the language of the first part of the rule, is left untrammelled, and would enable any cross-claim to be pleaded by way of defence and not necessarily by way of counterclaim. The best opinion I can form of the meaning of the rule is that the last-mentioned construction is the only feasible one, and that a defendant may elect in what form he will plead his cross-claim, whether as a set-off or by way of counterclaim. Order 20, r. 7, requires the grounds of defence, set-off, or counterclaim to be stated separately and distinctly, and Order 21, r. 17, enables the Court to give judgment for the balance due a defendant in excess of the plaintiff's claim, though he may not have counterclaimed therefor, but set up his cross-claim by way of set-off only.

In the case at bar defendant has not distinctly pleaded a set-off. It is true it has alleged that the plaintiffs were indebted to defendant in certain sums therein specified, but this cross-claim is distinctly pleaded by way of counterclaim. Defendant has made its election to proceed in that way, and I am therefore entitled to treat this litigation as claim and counterclaim. The result on the question of costs is indicated by what I have already said.

The appellants should have the costs of the appeal and cross-appeal on the issues upon which they have succeeded. They have sustained the judgment in respect of the item of $295.25, and have succeeded on the question of the costs of the action.

The respondent, who cross-appealed, failed in all respects. It is true that the plaintiffs' judgment has been reduced by $150, but that success, as stated above, was not by reason of the cross-appeal.

B. C.

C. A.

VICTORIA SAANICH CO. v. WOOD MOTOR CO. LTD.

IRVING, J.A.:—I concur in the judgment of the Chief Justice, with whom I have discussed the matter.

MARTIN, J.A., dissented.

GALLIHER and MCPHILLIPS, JJ.A., concurred with MACDONALD, C.J.A.

*Appeal allowed.*

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ALTA.

S. C.

## SHIER v. HACKETT.

*Alberta Supreme Court, Scott, J. July 7, 1915.*

1. VENDOR AND PURCHASER (§ I E—29)—RESCISSION OF SALE—INABILITY TO CONVEY—KNOWLEDGE OF PURCHASER AS DEFENCE.

A delay of more than thirteen months to furnish title to lands sold cannot be considered reasonable, and the fact that the purchaser was aware of the vendor's inability to convey until the vendor received a transfer for the land does not disclose a defence to an action for a rescission of the sale and return of the money paid thereon.

Statement

ACTION for rescission of an agreement for sale.

*Mackay, Hanley & Boyd*, for plaintiff.

*F. B. Byers*, for defendant.

Scott, J.

SCOTT, J.:—By agreement, dated August 22, 1913, the defendant agreed to sell to the plaintiff the lands mentioned in the statement of claim for $950, payable $500 at the date of the agreement, which sum was then paid, and the balance of $450, without interest, on November 1, 1913. The defendant agreed that upon the payment of all sums due under the agreement he would convey the lands to the plaintiff. On November 21, 1913, the plaintiff caused to be tendered to the defendant the sum of $450, with legal interest thereon, together with a transfer of the lands for execution by him, and, at the same time, caused a demand to be made upon him for the delivery of the certificate of title therefor. The defendant then refused to accept the amount tendered or to execute the transfer, and then stated, by way of explanation for his refusal, that the lands were not registered in his name. At the same time a demand was made upon him for the return of the $500 previously paid to him on account of the purchase money, but he refused to return the same. From time to time between that date and the commencement of this action on April 6, 1914, the plaintiff demanded from the defendant a conveyance of the property, and was at all times

ready and willing to pay the balance of the purchase money, but the defendant would not comply with such demand.

In this action the plaintiff claims: (1) A declaration that the agreement is rescinded; (2) delivery up of the agreement; and (3) the return of the $500 paid by him on account of the purchase money with interest.

The defendant, besides denying the making of the agreement, the tender of the $450 and interest and the transfer, alleges, as an alternative defence, that he purchased the lands from one Hackett, who is purchasing same from one Levasseur, who is purchasing the same from one Legassee, that the plaintiff was, at the time of his purchase, fully aware of these facts, that the defendant has been unable to obtain a transfer from Levasseur, and that he is ready and willing to give the plaintiff a transfer, but is unable to do so until a transfer is received from Levasseur.

On December 9, 1914, the plaintiff gave defendant notice of an application for an order that the statement of defence be struck out. The application was adjourned from time to time, and it was finally agreed that it should be referred to a Judge.

The parties appeared before me by counsel on May 3 last, and agreed that, as there were no facts in dispute, the questions of law arising upon the pleadings should be disposed of by me.

In addition to the facts I have stated, it was admitted, on the hearing before me, that on December 23, 1914, the defendant tendered a transfer of the lands.

In my opinion, the alternative defence raised by the defendant does not disclose a ground of defence to the action, and I am also of opinion that, upon the facts stated, there is not any defence open to him.

Notwithstanding that the plaintiff may have been aware at the time he purchased the property of the nature of the defendant's interest in it, the latter was bound under the terms of his contract to give the plaintiff a registrable title upon payment of the balance of the purchase money after the time fixed for payment thereof has expired. The tender of the balance was made by the plaintiff a few days after that time, and yet it was not until thirteen months after the tender that the defendant shewed that he was ready to give title. In the meantime the plaintiff had made repeated demands upon him to fur-

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nish titles, and had, after waiting for more than four months after the tender, commenced this action for rescission, and, even after the action was commenced, there was a delay of more than eight months before the defendant tendered a transfer.

While the defendant may have been entitled to a reasonable time after the tender of the balance of the purchase money to furnish a title to the property, a delay of more than thirteen months cannot be considered a reasonable delay. In *Krom* v. *Kaiser*, 21 D.L.R. 700, a delay of three months was held to be unreasonable. In that case the right of a purchaser to rescission on the ground of the vendor's delay in furnishing title was fully discussed, and the view there expressed appears to me to be conclusive upon the question of the plaintiff's right to recover in the present action.

I direct that judgment be entered for the plaintiff for the relief claimed by him with costs.

*Judgment for plaintiff.*

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SASK.

S. C.

## HARRIS v. WILSON.

*Saskatchewan Supreme Court, Newlands, Brown and Elwood, JJ.*
*July* 15, 1915.

1. BILLS AND NOTES (§ I C—15)—WANT OF CONSIDERATION—FUTURE DEBTS—RIGHTS OF TRANSFEREE.

A promissory note given on account of an anticipated threshing bill, on which no liability was in fact incurred, is unenforceable for failure of consideration even in the hands of a transferee for value who acquired it with knowledge of its true conditions.

[*Cossitt* v. *Cook*, 17 N.S.R. 84, applied.]

Statement.

APPEAL from judgment for defendant.

*G. A. Cruise*, for appellant.

*T. A. Lynd*, for respondent.

The judgment of the Court was delivered by

Newlands, J.

NEWLANDS, J.:—This is an action on a promissory note for $100.

The trial Judge found that the note was given under the following circumstances: The plaintiff, the payee of the note, was endeavouring to sell a threshing outfit to one Costello, and he wanted to get farmers' notes for the threshing that Costello was to do for them, and in pursuance of that the amount of the probable threshing account of the defendant was calculated, and

the note in question represents the amount of this anticipated threshing bill over and above what was required to pay the wages of the threshing outfit. The defendant plainly proves this. He is corroborated to a certain extent by Davis—an independent witness—and the note itself is marked "on a/c thresh bill 1912." The threshing amounted to $266.68, and the wages and so forth amounted to a shade more. In these circumstances the defendant denies liability, stating that he never received any consideration; or in the alternative that the consideration has wholly failed. And the learned Judge found that the consideration had wholly failed. I am of the opinion, from these facts, that there was never any consideration for the making of this note.

The defendant owed nothing to the plaintiff, and there is no evidence to shew that he gave the note as an accommodation note. At the time the note was given he owed nothing to Costello, so there could not be a novation as between these three parties.

This case is very similar to *Cossitt* v. *Cook*, 17 N.S.R. 84. There "A," who was indebted to the plaintiffs, sold defendant a threshing machine, and, in payment for the same, received from defendant a promissory note, which, at "A's" request, was made payable to plaintiffs. "A" forwarded the note to plaintiffs in part settlement of their account against him. "A" was not acting as plaintiffs' agent in selling the machine, did not inform them about the transaction, and had no agreement with them that the note should be taken in their favour. The Court held that the plaintiffs could not recover, because there was no consideration for the note moving from plaintiffs to defendant and no evidence to support a novation.

Mr. Cruise argued that in this case the plaintiff gave the machine to Costello on the strength of this note, and that there was, therefore, consideration; but, as the Judge held that plaintiff had notice of the circumstances under which defendant gave the note, this would not help him, as he would not be holder in due course on account of such notice, and, as Costello could not collect from defendant if the note had been made to him, neither can plaintiff. The appeal should be dismissed with costs.

*Appeal dismissed.*

ALTA.

S. C.

## MUNICIPALITY OF McLEAN v. SOUTHERN ALBERTA LAND CO.

*Alberta Supreme Court, Scott, Beck, and Walsh, JJ. June 30, 1915.*

1. TAXES (§ I E 1—48*a*)—PURCHASE OF CROWN LANDS—OCCUPANCY—TAXATION.

One holding land under a conditional contract of sale from the Crown, but not in actual occupancy thereof, is for the purpose of taxation nevertheless an "occupant" within the meaning of the Alberta Rural Municipality Act, although the land itself is exempt from taxation by reason of its ownership by the Crown.

Statement

APPEAL by the defendant from the judgment of Harvey, C.J.

*I. C. Rand*, for appellant.

*A. E. Dunlop*, for respondent.

The judgment of the Court was delivered by

Walsh, J.

WALSH, J.:—This is an appeal by the defendant from the judgment of the Honourable the Chief Justice after the trial of the action, by which judgment it was ordered to pay to the plaintiff the taxes claimed from it in respect of certain lands within the municipality of which it was in the year 1913 assessed as the occupant. The neat point for decision is whether or not the defendant was in that year the occupant of these lands within the meaning of the Rural Municipality Act, ch. 3, Alberta Statutes, 1911-1912.

Clause 9 of sec. 2 of that Act, as enacted by sec. 1 of ch. 7 of the statutes passed 1913, 1st sess., defines an "occupant" for the purpose of the Act as follows:—

> "Occupant" includes the inhabitant occupier or if there be no inhabitant occupier the person entitled to an absolute or limited possession; any person holding under a lease, license, permit or agreement therefor; any person holding under an agreement of sale or any title whatsoever or any person having or enjoying in any way or to any degree or for any purpose whatsoever, the use of land exempt from taxation.

The defendant is not in the actual occupation of any of these lands. Its interest in them is under agreement between the Crown and one Robins, representing the Robins Irrigation Co., as subsequently varied by Order-in-Council, which agreement has, with the consent of the Crown, been transferred to the defendant. It recites the application of Robins to purchase, under the provisions of the Irrigation Act and of the Dominion Lands Act relating to the sale of land for irrigation purposes, the available lands within a defined area, and that such application was granted The parties then agree that

His Majesty shall sell and the company shall purchase at the price of $3 per acre, 380,573 acres within the said tract hereinbefore described if that number of acres is available and if not, as many acres in the said tract as are available for such sale and purpose.

The remaining clauses of the agreement deal with terms of payment of the purchase money, the construction and operation of the irrigation works, completing the purchase and taking title for any part of the lands upon certain terms, and protecting the interest of the squatters and persons holding under lease from the Crown. Clause 10 provides

That any of the said lands that remain unsold at the expiration of fifteen years from the date of these presents shall revert to the Crown.

A clause which is obviously intended to make the agreement conform to the provisions of sub-sec. 2 of sec. 51 of the Irrigation Act, although it is much broader than the section.

This document is, in my opinion, an agreement of sale which binds the Crown to sell and the defendant to buy the lands upon the terms set out in it. The only element of uncertainty about it is in the description of the lands covered by it, and to that the maxim "*id certum est quod certum reddi potest*" applies. The agreement is for 380,573 acres within the area described in it, if there are that number of acres available, which, from the context, means, I think, available for sale by the Crown for irrigation purposes, and if not, then as many acres within it as are so available. It is admitted that there are so available approximately 412,041.12 acres, so that the defendant is entitled to the full acreage contracted for. The acreage substituted by the amending Order-in-Council for certain of the land described in the agreement is divided into three parcels, namely: (1) All the available lands in certain townships north of the Belly River: (2) all the available lands which lie between the Bow and the Belly Rivers in certain townships; and (3) a sufficient area from the available lands in certain other townships to make up the aggregate of 380,573 acres. The defendant is therefore bound to purchase and the Crown is bound to sell to it all of the available lands within parcels 1 and 2. The lands which the plaintiff assessed to the defendant occupant are all within parcel 1. The only question, therefore, as to them is whether or not the particular sections and parts of sections so assessed are lands which are available to it under its contract. A written admission is in the record that

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Walsh, J.

the defendant is the holder of the land in the statement of claim mentioned from the Dominion of Canada under and by virtue of the contract in question, the assignment thereof to it and the orders-in-council relating to it.

There has therefore been an express appropriation of these lands to this contract, and that being so the defendant holds them under an agreement of sale, and is therefore an occupant within the meaning of the Act, and is liable for the taxes rated against it as such. Under sec. 306 of the Act the plaintiff is entitled to recover the same by suit as a debt due to it, even though the land itself is exempt from taxation by reason of its ownership by the Crown.

I would dismiss the appeal with costs.

*Appeal dismissed.*

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CAN.

S. C.

## PHELAN v. GRAND TRUNK PACIFIC R. CO.

*Supreme Court of Canada, Fitzpatrick, C.J., Davies, Idington, Duff, and Anglin, JJ. February 2, 1915.*

1. MASTER AND SERVANT (§ II A 4—97)—SAFETY APPLIANCES—COUPLERS—FROZEN RELEASE—INJURIES TO EMPLOYEE UNCOUPLING—LIABILITY.

A train equipped with approved coupling devices as required by sec. 264 (c) of the Railway Act, R.S.C. 1906, ch. 37, which had been inspected upon its arrival according to the usual practice and no apparent defects found, will not render a railway company liable for injuries to an employee sustained while uncoupling a car resulting from the formation of ice inside the coupler, preventing its operation, but which could not be visible from the exterior.

[*Phelan* v. *G.T.P. R. Co.*, 12 D.L.R. 347, 23 Man. L.R. 435, affirmed.]

Statement

APPEAL from the Court of Appeal for Manitoba, *Phelan* v. *G.T.P. R. Co.*, 12 D.L.R. 347.

*F. B. Proctor*, for appellant.

*C. H. Locke*, for respondents.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—I am of opinion that this appeal should be dismissed with costs.

The car-coupler was of a type which complied in all respects with the requirements of the statute and had been approved of by the Master Car Builders' Association. It did not work on the occasion in question because of an obstacle created by unusual climatic conditions that could not be detected by the ordinary methods of inspection which were reasonably sufficient to

ensure the employees of the company against accidents, and there was nothing special in the circumstances which required extra precautions to be taken.

I agree with the Court of Appeal in the conclusion that in fact the car-coupler was effective and the inspection adequate and, therefore, that the company was, in the circumstances, without fault.

DAVIES, J.:—Two contentions were urged by Mr. Proctor why the judgment of the Court of Appeal, directing judgment to be entered for the defendant, should be reversed. One was that sec. 264 of the Railway Act casts an absolute and unqualified duty upon railway companies to provide and cause to be used on all trains modern and efficient apparatus, appliances and means, *inter alia*,

(c) to securely couple and connect the cars composing the train, and to attach the engine to such train with couplers which couple automatically by impact, and which can be uncoupled without the necessity of men going in between the ends of the cars;

and the other was that, under the findings of the jury, the plaintiff was entitled at common law, irrespective of the statute, to a judgment for the damages awarded.

The question as to the proper construction of sec. 264 is a most important and far reaching one. I am, however, not able to accept the suggested interpretation as the true one.

The statutory duty so far as regards sub-section (*c*), with which only we are concerned, consisted in providing car-couplers which would couple automatically by impact and which would uncouple without the necessity of men going in between the cars.

In all of the cases provided for in the section the statutory duty went beyond that imposed by the common law; but I am not prepared, as at present advised, to hold that it imposed the absolute or unqualified duty contended for, involving obligations which neither skill, care or absence of negligence, could avail to avoid.

In the present case, however, the defendant did not obtain any finding from the jury as to a breach of their statutory duty and, in the absence of such a finding, his contention must fail.

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Davies, J.

On the common law liability of the company invoked by the plaintiff, the only findings of the jury were that the defendant company was guilty of negligence and that this negligence was "through lack of proper inspection."

This express finding negatives any other negligence on the defendants' part.

I am unable to find any evidence warranting the jury's finding. We have the express evidence of Neill, who at the time of the accident was defendants' car inspector at Melville, and of Couchman, who was plaintiff's witness, that on the arrival of the train on the night of the accident an inspection was made by them one on each side of the train with a lantern and the couplers of each car were inspected from the outside and that there were no visible signs of snow or ice on the couplers, or other evidence to cause any suspicion as to their not being all right and in good order.

It must be borne in mind that the jury did not find any defect in the coupler. As a matter of fact, after the accident occurred, the discovery was made that the coupler did not work. It was at once taken off and opened and examined by Neill, who states that he found it nearly filled with ice which, he surmised, had fallen on the outside of the coupler in the shape of snow which had melted and dropped into the coupler and that, after the ice was removed, he found it "worked fine" and was in first-class condition.

The uncontradicted evidence is that the coupler was a standard one approved of by the Master Car Builders' Association and one of the best on the market.

The truth is, that there was nothing the matter with the coupler itself, but that, owing to climatic conditions, it had become partially filled with ice, which prevented its proper working and that its condition was not detected until after the accident happened, when it was taken apart by Neill, and could not be detected by such an outside examination as good railway practice called for and as was made by Neill and Couchman.

The system of inspection as made by Neill and Couchman was approved of by Mr. Cowan, general car foreman of the Canadian Northern Railway Company, and other experts as

good railway practice. All the experts agreed that any pulling of the cars apart to inspect the couplers was impracticable, and that the inspection sworn to alike by Neill and Couchman was the only practicable one.

No witness gave evidence of anything omitted by these inspectors which ought to have been done by them, and if the jury, in the absence of evidence, drew inferences as to what should have been done in addition to what was done they should have stated what these inferences were and not put their finding in the vague and unsatisfactory language they used.

There was much discussion as to the meaning and effect of their finding "through lack of proper inspection." There is an air of delightful vagueness and uncertainty about it amply justified by the absence of any evidence.

I am willing to accept the interpretation offered by appellant of its meaning as a possible one and as meaning that a proper inspection would have revealed the unworkable condition of the coupler. But surely that which was wanting in the inspection, as made, should have been stated in the finding. All the experts agree that it was a good and proper inspection and several suggestions made to them of a possibly better inspection were stated to be impracticable.

Under these circumstances, in the total absence of any evidence to support the finding and because of its vagueness and uncertainty, I would dismiss the appeal and confirm the judgment of the Court of Appeal with costs.

Idington, J.
Duff, J.
(dissenting)

IDINGTON, and DUFF, JJ., dissented.

Anglin, J.

ANGLIN, J.:—Although I was unavoidably prevented from hearing the conclusion of the argument in this case, I understand that it is the desire of the parties that I should take part in the judgment.

In my opinion, this appeal should not succeed. In answer to the question, "In what did the negligence of the defendants consist?" the only finding of the jury is "Through lack of proper inspection." All other charges of negligence preferred by the plaintiff have thus been negatived: *Andreas* v. *C.P.R. Co.*, 37 Can. S.C.R. 1.

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As is pointed out by Perdue, J.A.:—

> Failure to inspect was not in itself the direct cause of the accident. There must have been something wrong with the coupler which caused it to fail and the jury have made no finding as to this.

As put by Osler, J.A., in *Schwoob* v *Michigan Central Railroad Co.*, 13 O.L.R. 548 at 553:—

> Want of inspection, unless there was some existing defect which inspection would have disclosed, is not defect, or, by itself, negligence.

Three suggestions are made in regard to the cause of the failure of the coupler to operate—that there was a defect in it due, either to original vice, or to a state of disrepair, or that the failure was due to the presence of ice in the cup or chamber.

The finding of lack of proper inspection is consistent with the existence of any one of these conditions. It is impossible to say which of them the jury had in mind. Indeed, the appellant himself suggests that the jury may have had in view some defect in the engine, which, it is said, was leaking steam. This possibility only serves to shew how inconclusive and unsatisfactory the finding really is.

There is not a tittle of direct evidence either of original defect or of a state of disrepair. The coupler is shewn to have been one of the best on the market—a standard appliance and such as admittedly met the requirements of sec. 264 (*c*) of the Railway Act. The only indirect evidence of anything being wrong with it is that afforded by the fact of its failure to work. That might be due either to a defect of the mechanism or to the presence of ice or snow, and does not, therefore, in itself, afford any proof of the existence of either condition. The only direct evidence in the record upon this point is that of Neill, who says that, on subsequent examination made by him, ice was found in the cup or chamber in quantity sufficient to account fully for its failure to operate and that on the removal of this ice the coupler "worked fine." He also says that it was not worn and that every part of it was in first-class condition. This evidence is uncontradicted. If it may be assumed that in this particular the jury dealt with the case upon the evidence, it may perhaps be inferred that they meant to find that a "proper inspection," before the accident occurred, would, if made, have disclosed the

presence of the ice afterwards found by Neill. They have not so found, however, and their finding is consistent with their having proceeded on an assumption of some entirely different defect which, on inspection, would have been discovered.

But assuming that the presence of the ice in the coupler is what they thought "proper inspection" would have detected, there are other serious difficulties in the way of sustaining their verdict. There is no evidence as to the "history" of the car carrying the refractory coupler for any period preceding the accident—nothing to shew when it was coupled to the adjoining car—nothing to enable us to say when the coupler had last been operated—nothing to inform us to what weather conditions it had been exposed—nothing to exclude the view that on the last occasion when the car should have been inspected, prior to its arrival at Melville, the coupler was free from ice and in perfect order. The car had arrived in the Melville yards forming part of a fast freight train only a short time before the accident and had been inspected. It is, therefore, against the sufficiency of this inspection that the jury must be taken to have pronounced.

The evidence as to the inspection actually made at Melville is given by the men who made it—Neill and Couchman. Their evidence is that they inspected the cars forming the train according to instructions. They and a number of other fully qualified railway men in the employment of the defendants and in that of other railway companies testify that the inspection which is sworn to have been made is the only kind of inspection that is practicable in the case of a train stopping *en route*. This evidence is uncontradicted. It is not within the province of jurymen to constitute themselves experts on such a technical question of proper railway practice and, without any evidence to warrant such a course and against all the evidence before them, to find that the method of inspection prescribed is improper: *Jackson* v. *G.T.R. Co.*, 32 Can. S.C.R. 245. If the verdict means that the system of inspection was improper, viewed as a finding upon an ordinary question of fact it should be set aside, not as being against the weight of evidence, but as being against the evid-

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Anglin, J.

ence: *Jones* v. *Spencer*, 77 L.T. 536. As Lord Herschell puts it, at p. 538:—

> I cannot myself say . . . that the jury have found their verdict upon the evidence.

Viewed as a finding upon a matter of technical knowledge it is still less defensible: *Managers of Metropolitan Asylum District* v. *Hill*, 47 L.T. 29; *Jackson* v. *Hyde*, 28 U.C.Q.B. 294; *Fields* v. *Rutherford*, 29 U.C.C.P. 113.

But it is contended that the jury may have meant that the inspectors were negligent and did not carry out their instructions. It is admitted by every witness who gave evidence on the subject—although they say that it is of rare occurrence—that ice such as is said to have been found in the coupler in question might be there without any trace of its presence being visible on the outside of the coupler. The men who made the inspection both say:—

> There were no visible signs to shew that there was anything wrong with that coupler.

They examined it again after the accident and by visual inspection could still see nothing wrong. The yard foreman, Taylor, corroborates them on this point. Ault, the plaintiff's fellow-workman, called by him as a witness, says the same thing. The evidence of these witnesses is uncontradicted. Neill swears that the condition afterwards found by taking the coupler apart could not have been discovered by the inspection which it was his duty to make and which he and Couchman both say they actually made.

But negligence of Neill and Couchman in the actual inspection, if found, and properly found, would not have sufficed to sustain the verdict at common law, because the defence of common employment, although taken away by legislation of the Province of Saskatchewan, in which the accident happened, is available in the Province of Manitoba in which the action has been brought: *The "Halley,"* L.R. 2 P.C. 193. The findings are insufficient to warrant a judgment under the Workmen's Compensation Act.

The Court of Appeal for Manitoba has deemed it a proper exercise of their discretion and within their power to direct the

entry of judgment for the defendant dismissing the action instead of ordering a new trial. No objection to this course is taken by the appellant. Upon this question of practice I am not disposed to interfere.

I am, for these reasons, of the opinion that the verdict for the plaintiff was properly set aside and that the judgment dismissing the action should be affirmed.

*Appeal dismissed with costs.*

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## SHEPARD v. ASTLEY.



*Alberta Supreme Court, Harvey, C.J., Scott, Beck, and Walsh, JJ. June 1, 1915.*

1. APPEAL (§ II C 1—50)—MASTER'S ORDERS—LAND ACTIONS—POWER OF JUDGE ON APPEAL FROM.

A Judge on appeal from a Master has the like discretionary powers, under Rules 326, 312 and 3 (Alta.), as the Court on an appeal from a Judge, and he may therefore rescind a Master's order directing a rescission of a land agreement and grant leave for an alternative remedy.

APPEAL from a judgment of Stuart, J. Statement

*H. P. O. Savary*, for the plaintiff.

*W. H. Sellar*, for the defendants.

BECK, J.:—This is an appeal from an order of Stuart, J., in Chambers, on an appeal from the Master. Beck, J.

The action is on an agreement for sale and purchase of land—vendor against purchaser—claiming specific performance, a personal judgment, a declaration of lien, sale, rescission, and forfeiture of moneys paid. No defence was filed, but apparently a demand of notice was served.

The plaintiff then gave notice of motion before the Master for an order

that the agreement for sale mentioned in the pleadings be specifically performed and for an order *nisi* and in default of payment that the said agreement be rescinded and that the defendants do account to the plaintiff for all loss or profits received or enjoyed by them or on the alternative sale and foreclosure and for such further and other order as to the said Master may seem meet.

On the hearing of this motion the Master made an order to the following effect:—

(1). The agreement was ordered to be specifically performed. (2). The sum of $8,628.45 was found to be owing for principal and interest by the

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Beck, J.

defendant to the plaintiff. (3). It was ordered that upon the defendants paying to the plaintiff or into Court within two weeks of service the said sum and the plaintiff's taxed costs and the balance of the instalments under the agreement, the plaintiff do execute, &c. (4). But in default of payment of the said sum and costs within that time and on default of payment within three months of maturity of any subsequent instalment with interest, the plaintiff should be at liberty to apply for (a) an order that the agreement should be rescinded and that the defendants do account to the plaintiff for all rents, revenues and profits received by them from or on account of the said lands; or (b) an order for sale; or (c) an order for personal payment.

Notice was given by the plaintiff of a motion before the Master

for an order that the agreement XX be rescinded and for possession to be given to the plaintiff and for judgment against the defendants for the interest due under the said agreement for sale at 8% per annum until the date of rescission or for an accounting of rents and profits or in the alternative sale or foreclosure and for such further and other order as to the said Master may seem meet.

This motion was returnable on February 23, 1915.

Having heard the motion, the Master, on March 26, 1915, made an order as follows:—

(1). The agreement was rescinded. (2). Immediate possession was ordered. (3). It was ordered that the defendants do account to the plaintiff for all rents and profits received by them or any of them during their possession of said lands under the terms of said agreement for sale from the cultivation or other use of the said lands as agricultural lands, . . . ; and that the plaintiff do account to the defendants for all interest and other sums received by him from the defendants or any of them under and by virtue of said agreement . . .

The plaintiff appealed from this order; the grounds of his appeal being stated as follows:—

1. The agreement sued on being rescinded the defendants, having sold at a profit the lands which they purchased under said agreement, are liable to account to the plaintiff for the profit so obtained or which but for their wilful default they could have obtained.

2. The defendants are liable to account to the plaintiff for the interest on the purchase price received by them on the resale of the property. 3. The defendants as purchasers under the agreement sued on, are liable on rescission to account as mortgagees in possession. 4. The defendants being in wilful default are liable to account for rents and profits obtained or which they might have obtained but for such default.

The motion by way of appeal was heard by Stuart, J., who allowed the appeal without costs, and ordered

that the order pronounced by the Master in Chambers herein of date the 26th March, 1915, be rescinded and that the plaintiff be given leave to renew the application made by him on the 23rd February, 1915, and to move for any alternative remedy to which he may be entitled.

From this order the defendants appealed on the following:—

1. That the learned Judge had no jurisdiction to order that the order pronounced by the Master in Chambers dated the 27th day of March, 1915, should be rescinded in its entirety when neither the plaintiff nor defendant applied or asked that such order be rescinded.

2. That the learned Judge had no jurisdiction to grant an order rescinding the order above mentioned when the application by way of appeal from the decision of the Master was to vary such order only as to the accounting which should take place thereunder.

3. That the learned Judge had no jurisdiction to grant an order that the plaintiff be at liberty to apply for the sale of the said lands and premises, or the enforcement of the said agreement, as the same had been rescinded on the application of the plaintiff and when the plaintiff's application to vary the order of the Master was based on the fact that such agreement had been rescinded.

4. That the learned Judge had no jurisdiction to grant an order rescinding the order of the Master in Chambers above mentioned on the appeal of the plaintiff when such order had originally been granted on the application of the plaintiff.

On the argument before us, the defendant's counsel expressed himself as satisfied with the order of the Master of March 26, and the Court was of opinion that the plaintiff was not entitled to call upon the defendant to account to any greater extent than as directed by that order. The only question then remaining for consideration is whether the learned Judge was authorized to rescind the Master's order and in effect to permit the plaintiff to disregard the order for rescission and ask for an order for sale.

On the part of the defendant it is contended that the plaintiff having been given an order for rescission with certain specified consequential relief, and having appealed from the order solely on the ground that the consequential relief specified is not the full extent of the consequential relief to which he is entitled, thus impliedly and, in fact, expressly—"the agreement sued on being rescinded"—accepting rescission, he elected the remedy by way of rescission, and the term of the order directing rescission must stand; and it was not open to him on the appeal to the Judge to ask, nor for the Judge to grant the relief of sale asked for alternatively on the notice of motion, which he must now be taken to have abandoned. On the part of the plaintiff it is contended that an appeal to a Judge is a rehearing, and that upon such a rehearing the Judge has the like powers as the Court on an appeal from a Judge, *viz.*, according to r. 326,

full discretionary power to make any amendment of the proceedings before it . . . and to give any judgment and to make any order which ought

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to have been made and to make such further or other order as the case may require. The powers aforesaid may be exercised by the said Court notwithstanding that the notice of appeal may be that part only of the decision may be reversed or varied, and such power may be exercised in favour of all or any of the respondents or parties although such respondents or parties may not have appealed from or complained of the decision.

I think the plaintiff's contention is right. Rule 312 gives an appeal to a Judge from a Master; there is no specific rule indicating the powers of a Judge upon appeal. Rule 3 says:—

As to all matters not provided for in these rules the practice as far as may be shall be regulated by analogy thereto.

By force of this rule, it seems to me, a Judge on appeal from a Master must be held to have the like powers as the Court on an appeal from a Judge, namely, those set forth in r. 326.

If this is so, I think that the learned Judge did what was within his powers; and I see no reason on other grounds for disturbing his order.

I have looked at a number of cases under the English and Ontario rules, but they seem to me to be of little assistance in interpreting our own rules.

I would dismiss the appeal. Having regard to the contention of the respective parties and their divided success, I would give no costs of the appeal.

The learned Judge expresses an opinion in the nature of directions to the Master in the event of a rule being ordered. I am not inclined to agree with his views in this respect, and I think the Master should deal with all the questions relating to the sale unfettered by any directions in advance.

Harvey, C.J. (dissenting)

HARVEY, C.J., dissented.

Scott, J. Walsh, J.

SCOTT and WALSH, JJ., concur with BECK, J.

*Appeal dismissed.*

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## DUTTON WALL LUMBER CO. v. FERGUSON.

*Saskatchewan Supreme Court, Haultain, C.J., Lamont, and McKay, JJ. July 15, 1915.*

1. PRINCIPAL AND AGENT (§ I A—6)—LIMITED AGENCY—LAW CLERK—AUTHORITY TO PREPARE LEASE—PLEDGING CREDIT FOR IMPROVEMENTS.

The express authority given one employed as a law clerk to prepare a lease on behalf of the principal does not import the ostensible authority of pledging the principal's credit with respect to materials and improvements on the leased premises.

Statement

APPEAL from judgment for plaintiff.

*J. F. Frame*, K.C., for appellant.
*Squires*, for respondent.

The judgment of the Court was delivered by

McKAY, J.:—Plaintiff claims that, by an agreement in writing entered into on or about March 17, 1913, the defendant agreed that if the plaintiff would supply lumber and other building material for building a barn and repairing the roof and windows of a house on the north-west quarter of section 10, township 35, range 1, west of the third meridian, that defendant would pay for the same.

The plaintiff claims it furnished said lumber and other building material to the amount of $119.85, which was used in building said barn and repairing said house, but that defendant refuses to pay for the same.

In the alternative the plaintiff alleges that, on or about April 6, 1914, the defendant agreed in writing with one Frank Porter that if the said Frank Porter would build a small barn, 28 ft. by 16 ft., by 7 ft. high, box-car roof, and repair the roof and windows of the house on the north-west quarter of section 10, township 35, range 1, west of the third meridian, he, the defendant, would pay for the same.

That the said Porter built said barn and repaired the roof and windows of said house during the month of April, 1914, and, for the purpose of said building and repairing, obtained from the plaintiff lumber and other building material to the amount of $119.85, but defendant refuses to pay the same.

That by writing dated September 3, 1914, containing apt words, the said Porter assigned to the plaintiff all his claim against the defendant.

There is no evidence to support the first part of the claim, and the learned trial Judge gave judgment in favour of the plaintiff on the alternative claim, and from this judgment the defendant appeals.

The alternative claim is based on the following document put in as ex. "C" at the trial:—

> You may build small barn, 28 x 16 x 7 feet high, box-car roof, and repair roof of house and windows of house, and send bill to me and I will pay.
>
> J. D. FERGUSON,
> *Per* G. A. Ferguson.

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McKay, J.

The question to be decided is: Had G. A. Ferguson authority to pledge the credit of the defendant? The facts are, shortly, as follows:

It appears that the defendant had leased to Frank Porter and his three sons, for the year 1913, the land on which the barn was subsequently built, and had had some discussion with them about building a barn thereon, 24 ft. square, in the spring of 1913. This was not done, as the lessees hadn't time to do it that spring.

About March 1, 1914, the defendant, who was then leaving for England, instructed G. A. Ferguson, a third year law student in his office, to prepare a lease of the said lands to the Porters on the same terms as the lease for 1913. Some time in March, 1914, Frank Porter received a letter from the defendant's office in Saskatoon, asking him to send in his lease for 1913. The letter was not produced, but he says it said: "Send in the old contracts, for I cannot get my hands on mine." Frank Porter sent in to the defendant's office his lease for 1913, and after this, about April 4, 1914, his son Jesse Porter came to the defendant's office, and he, Frank Porter, says: "I told him to tell J. D. Ferguson to let us have a barn; I thought probably $50 or $60 would put up a barn. And I got a letter from Ferguson's office authorizing me to build that barn." The letter referred to is ex. "C."

Apparently at this time Frank Porter was of the belief that he would require the defendant's authority to build the barn, notwithstanding what may have taken place between them in 1913.

It appears that it was on this occasion, when Jesse Porter came into Ferguson & McDermid's law office, that the lease was prepared, the cheque for the seed wheat, and ex. "C" were given, and the learned trial Judge so finds.

Jesse Porter first saw Mr. McDermid (the defendant having already left for England), and he says: "I told him I came in for the money for the seed wheat and he told me to come back in an hour and George would be in." Later, when Jesse Porter came back, he saw George A. Ferguson and apparently got the new lease for 1914, and certainly the cheque for the seed wheat, signed: "J. D. Ferguson per F. F. McDermid," and also the letter or order in question, ex. "C."

With regard to getting this order, he says: "George took me

into Ferguson's office and asked me if J. D. Ferguson had given me any right to build this barn, and I said he certainly did."

Jesse Porter then proceeded to tell him the size of the barn, and G. A. Ferguson wrote and signed and gave him ex. "C," which he, Jesse Porter, subsequently delivered to his father.

It is to be noted that the Porters never had any dealings before this occasion with G. A. Ferguson, and on this occasion it was only Jesse Porter that had any dealings with him.

Do these facts then, of G. A. Ferguson preparing this lease for 1914 on the same terms as the old lease, which provided for the defendant furnishing the seed grain, and giving the cheque for the seed grain signed by F. F. McDermid, hold him out as an ostensible agent of the defendant, or an implied agent of the defendant with authority to pledge defendant's credit for this lumber and building material in question? I am of the opinion that they do not.

But the onus lies upon the person dealing with the agent to prove either real or ostensible authority, and it is a matter of fact in each case whether ostensible authority existed for the particular act for which it is sought to make the principal liable: 1 Hals., p. 159, and the cases there referred to.

Express authority is distinctly negatived by the defendant, and the plaintiff does not attempt to prove any. The defendant swears the only authority he gave G. A. Ferguson was to prepare the lease for 1914, in the same terms as the lease for 1913, which provided for the furnishing of the seed wheat by defendant, but says nothing about the barn. And, according to the evidence of Jesse Porter, who was the messenger or agent of Frank Porter, before G. A. Ferguson gave him the order, he asked him, Jesse Porter, if defendant had given him any right to build the barn. This, to my mind, shews that G. A. Ferguson was not of his own motion giving this letter, but rather that it was given on the assurance of Jesse Porter that his father was entitled to it. This the defendant denies. He says when the barn was spoken of in the spring of 1913 it was a barn 24 ft. square, and this is admitted by the Porters.

Furthermore, the cheque for the seed wheat being signed by F. F. McDermid and not by G. A. Ferguson, was, to my mind, intimation to the Porters of G. A. Ferguson's limited authority.

The onus being upon the plaintiff to shew that the defendant held out G. A. Ferguson as his agent, the evidence produced is

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McKAY, J.

not, in my opinion, sufficient to satisfy that onus. All G. A. Ferguson did, apart from this order, ex. "C," was to prepare a lease and get the cheque for seed grain as was done the year before, and anything more than this, namely, the giving of ex. "C," was done at the request of Jesse Porter and on the assurance that they were entitled to it. How then can it be said that the defendant held him out as his ostensible agent for this purpose?

I am also of the opinion that G. A. Ferguson was not the implied agent of the defendant with authority to pledge his credit.

> The implied authority of an agent extends to all subordinate acts which are necessary or ordinarily incidental to the exercise of his express authority. It does not, however, extend to acts which are outside the ordinary courses of his business, or which are neither necessary nor incidental to his express authority: 1 Hals., p. 164 and the cases there cited.

The express authority given by defendant to G. A. Ferguson was to prepare the lease as above stated, and I do not think this would give him authority to pledge the defendant's credit for the building of a barn or repairing the house. These, to my mind, are not "subordinate acts which are necessary or ordinarily incidental to the" preparing of a lease on terms which do not provide for the building of a barn or repairing of a house.

Counsel for the defendant contended that defendant's evidence is to the effect that he had authorized G. A. Ferguson to look after this farm, leased to the Porters. But I do not think that is the effect of it. The evidence on this point is set out on pp. 16 and 17 of the Appeal Book, and that evidence clearly shews that all the authority defendant gave G. A. Ferguson was to prepare a lease on the same terms as the previous year.

Counsel for the respondent laid considerable stress upon the following question and answer:—

> 61. Q. So that he had that particular farm to look after for you? A. Yes. He was looking after *that matter* for me.

He argued that this was authority to look after the farm generally. But I think this must be taken in connection with the evidence immediately preceding it, where defendant sets out the express instructions he gave about the lease, and defendant evidently by the words "that matter" referred to the preparation of the lease referred to in question and answer No. 59.

I am therefore of the opinion that this appeal should be allowed with costs.

*Appeal allowed.*

## MUNROE v. McDONALD.

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*Nova Scotia Supreme Court, Graham, C.J., and Russell, and Drysdale, JJ. May 15, 1915.*

1. VENDOR AND PURCHASER (§ I C—13)—INCUMBRANCE ON TITLE—SEWERAGE TAX PAYABLE IN INSTALMENTS—RIGHT TO DEDUCTION IN TOTO.

A covenant in a deed warranting the property to be free from all incumbrances and that the vendor will pay taxes, local improvement and other assessments due on the property, entitles the purchaser to an allowance of the full amount of a sewerage rate charged against the land, notwithstanding that the sewerage tax is payable in annual instalments and that all instalments were paid to date.

Statement

APPEAL from the judgment of Ritchie, J., in favour of the plaintiff.

*L. A. Lovett*, K.C., for appellant.

***D. A. Cameron*, for respondent.**

Graham, C.J.

GRAHAM, C.J.:—The plaintiff, the vendor, purchased for $2,200 from the defendant a property at Sydney by an agreement under seal, dated July 31, 1905, the price to be paid $500 down and the balance by monthly instalments. Sewers had recently been constructed on two sides of this property. The city of Sydney has a statutory lien for sewerage rates, and under this provision they are payable as follows: The whole rate may be paid at once, or, at the option of the landholder, the amount may be divided into ten annual instalments to be paid with interest on each instalment at the rate of 5 per cent.

Sec. 282 of the Acts of 1903, ch. 174, is as follows:—

> The special rates referred to in the next preceding section of this Act may be paid in one lump sum or in ten annual payments, each payment to consist of one tenth part of the principal sum, together with one year's interest on the amount remaining due with interest at 5 per centum per annum.
>
> The amount due for such sewer rate or assessment shall constitute a lien or charge on the land to which the same is chargeable and shall have priority over every grant and lease or other conveyance and over every judgment, mortgage or other lien or incumbrance whatsoever affecting such land or the title thereto, and shall be enforceable in the same manner and with the same remedies as taxes on real estate. Upon the sale of such land for taxes or sewer rates there shall be deducted from the proceeds thereof the full amount of sewer rates for which such property is liable although the whole may not be then due or payable.

The defendant, then owner, had adopted the instalment plan of payment for the sewer rates. At the time of sale he had al-

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Graham, C.J.

ready paid two instalments of the amount payable for the sewer improvement in respect to this lot while he owned it, namely, up to July 31, 1904.

Then, in the agreement for sale of July 31, 1905, the question would naturally arise about the sewer rate. There was on that day one instalment due. This provision was inserted:—

> The vendor to pay taxes, local improvements, and other assessments of whatsoever kind now due on the property; the property tax for the year 1905 to be equally borne by the parties to this agreement.

The deed was not to be given until the land was paid for.

The first question is whether the parties meant by that that the vendor was to pay the whole rate irrespective of whether the instalments were payable or not, or whether they meant that the instalments thenceforth payable were to be paid by him. Where was the line to be drawn? Inevitably the city would resort to its lien against the land when each instalment matured. It could not do so before. The city looks to the land. In the event the plaintiff had to pay some $146.34 to relieve his land and he sues the defendant for money paid, alleging an obligation of the defendant to pay the amount because he gave a deed with covenants against incumbrances. The deed is dated May 18, 1906. That is not very material because if the defendant should pay the rates, the plaintiff having been compelled to pay them by the city, he would have an action to recover it over.

I must confess that I have serious doubts about the case. Because the sensible way of doing the thing was for the plaintiff to assume the unpaid instalments of the sewer rate and have that arranged in the price rather than have the defendant paying those instalments for ten years after he had parted with the land.

But I think the words "now due on the property" are words sufficiently apt to describe the total rate then unpaid though not then enforceable, meaning "now a charge on the property."

I think the context makes a difference even if the ordinary commercial meaning of the word "due" is payable.

If the parties meant instalments or portions of the rate now due on the property they should have said so. As to the word "due" I simply follow Robinson, C.J., in *Hall* v. *Brown*, 15

U.C.Q.B. 419. I think it is the total rate, or rather the unpaid amount of it in sec. 281 which constitutes the lien or charge rather than the instalments as they mature.

The words at the close of the section only provide for payment out of the surplus proceeds of instalments although not then enforceable against the land, and no trustworthy implication can be drawn from them.

I think the appeal must be dismissed with costs.

Russell, J.

RUSSELL, J.:—The plaintiff agreed to purchase a property from the defendant by an agreement which provided that the defendant was to give him a warranty deed, to be given at the expense of the vendor and to contain the ordinary covenants and the property to be free of all incumbrances whatsoever except a mortgage to one Muggah for $1,000, "the vendor to pay taxes, local improvements and other assessments of whatsoever kind now due on the property, the property tax for the year 1905 to be equally borne by the parties to this agreement."

The agreement was made in July, 1905, which was of course the reason for the division between the parties of the property tax.

Previous to the making of the agreement a sewerage system had been introduced under a statute, which made the whole amount of the sewerage rates a lien, that is to say an incumbrance, upon the property, but provided that this might be spread over a period of ten years. If the clause of the agreement in reference to the charges for local improvements indicated unambiguously that the vendor was only to pay the annual instalments of the sewerage claim payable up to the date of the agreement, such a provision would probably override the sweeping terms of the covenant against incumbrances, but the clause is not unambiguous. There is a sense in which the whole amount of the sewerage rates was due at the date of the agreement and in view of this ambiguity I think the learned trial Judge was right in deciding that the plaintiff was entitled to have a deed, which in fact he did have, from the defendant giving him a title free from any incumbrance for sewerage rates.

The construction of the words "now due" in the agreement is not necessarily the same as the construction to be put upon

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the word "due" as used in the statute relating to sewerage rates, which is sec. 282 of ch. 174 of the Acts of 1903, but in a doubtful case I think it right to consider the meaning of the word as used in the statute. That section, it must be confessed, is ill-drafted, in that it uses the word "due" in two senses, but I do not think it is to be interpreted otherwise than as it has been by the learned trial Judge. All difficulty, however, will disappear if the words "due or payable," at the end of the section, are read as if they had been written "due," in the sense of "payable." In the earlier portions of the section the amount due clearly means the whole amount for which the property is liable whether immediately payable or not.

The plaintiff, on re-selling the property, was obliged to deduct from his selling price $146.34 for sewerage rates, being the unpaid balance claimed by the city and which was a lien on the property. He is entitled to recover this amount from the defendant under the covenant in the defendant's deed and should not be obliged, as the defendant claims, to pay it to the city for sewerage rates as he has already paid that charge in his settlement with his purchaser. It is the latter who should pay the sewarage rates as he has deducted them from the purchase price of the property in his settlement with the plaintiff. Possibly the defendant should have brought him in as a third party so as to have a decree that he should pay the amount to the city but that is not the plaintiff's affair. He is entitled to the relief sought and decreed to him by the judgment appealed from.

Drysdale, J. (dissenting)

DRYSDALE, J., dissented.

*Appeal dismissed.*

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MAN.

K. B.

## MEINDL v. BRAVENDER.

*Manitoba King's Bench, Prendergast, J. July 27, 1915.*

1. VENDOR AND PURCHASER (§ III—35)—ASSIGNMENT BY VENDOR—CONDITIONS AS TO PAYMENT—INSTALMENTS—FORECLOSURE.

Where the payment for an assignment of an agreement for the sale of lands is made dependent upon the condition of the payment of the contract instalments, the fact that the assignee foreclosed and acquired the purchaser's interest cannot be substituted in lieu of the condition where the instalments were not in fact paid.

Statement

ACTION on an assignment of an agreement for sale of land.

*H. F. Touch*, for plaintiff.

*J. F. Davidson*, for defendant.

PRENDERGAST, J.:—The plaintiff assigned by deed to the defendant his interest in an agreement for the sale of lands wherein he, the plaintff, was the vendor and one Dickson, the purchaser, and the action is brought to recover $1,500 as balance of the consideration for the assignment. The consideration in the agreement, which is dated January 13, 1913, is $7,500 of which $2,500 was a cash payment and the balance to be paid in two equal annual instalments with interest at 6 per cent. The deed of assignment wherein the consideration is stated to be $1, is dated February 22, 1913—so that there were then due at the time on the agreement for sale the two payments of $2,500 each respectively coming due on January 13, 1914 and 1915, with interest thereon.

The plaintiff also covenants in the assignment to make the two payments to become due under the agreement for sale in case of default by the purchaser Dickson. The plaintiff's contention is that $1 was not the true consideration for the assignment, but that besides $3,000 paid to him at the time of execution, there was also, as part of the consideration therefor, "the promise of the defendant to pay the further sum of $1,500 so soon as the next payment, that is, the payment of $2,500 payable on January 13, A.D. 1914, should be made by the said Dickson."

The evidence of Uriah S. Strome, who, as the defendant's agent negotiated the assignment, is really to the same effect, except that he adds that the $1,500 was only to be payable in the event of Dickson meeting the first instalment promptly.

We have it then, both under the statement of claim and by the evidence of the defendant's agent in the matter, that the payment of $1,500 was conditional, being contingent on the uncertain event of Dickson paying the first instalment—except that Strome adds to the condition that Dickson's payment was to be made promptly.

It is true that the plaintiff's evidence is different, being to the effect that the $1,500 was to become payable when the first

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instalment on the agreement for sale became *due*. That would make it an absolute promise to pay on January 13, 1914, which is not only contradicted by Strome and the defendant's son, but is wholly at variance with the statement of claim, and moreover, unlikely, as there would then have been no reason not to set out the true consideration in the assignment if there was an unconditional promise to pay on a certain date.

As to the further element of promptness, as brought in by Strome's evidence, it is not necessary to consider it, as the fact is that the instalment was never paid. The evidence shews that shortly after January 13, 1914, when the first instalment was due and Dickson failed to meet the same, Mr. Strome agreed with the plaintiff that, by making Dickson's payment on the agreement for sale, he, the plaintiff, would become entitled to the $1,500; but the instalment was never paid either by Dickson or by the plaintiff. In short, the condition as set out in the statement of claim and borne out by the evidence, admittedly did not happen.

The plaintiff, however, relies on something further which is set out in par. 5 of the statement of claim.

It appears that two months after the said instalment on the agreement for sale was past due—*i.e.*, March 14, 1914—the defendant served cancellation notice thereunder, both on Dickson and the plaintiff; and said paragraph 5 sets out that the defendant

> thereby acquired all the right, title, interest and estate of the said Dickson in full payment and in lieu of the payment of the said sum of $2,500, and in lieu of all other payments by the said Dickson . . . and that the defendant did acquire the said interest of the said Dickson as aforesaid on or about April 15, A.D. 1914, and the defendant did thereupon become liable to pay the plaintiff the said sum of $1,500.

The full facts with respect to cancellation are that, after causing cancellation notice to be served as aforesaid, the defendant Bravender brought suit against Dickson and the present plaintiff Meindl on April 7, 1914, setting out, among other allegations, the serving of the cancellation notice and praying in the usual form for personal judgment and foreclosure within a time to be fixed by the Court in case of default. The defence of Dickson and the present plaintiff was to the effect that the

serving of the cancellation notice on them had cancelled all their rights and that all interests which they ever had in the land were now vested in Bravender, thereby voluntarily relinquishing any equitable relief they might have. Then, on motion of the present plaintiff, there was judgment declaring his interest and that of Dickson to be cancelled and at an end.

I should here say, with respect to an alleged letter from the defendant to the plaintiff (ex. 3), that I cannot take it to have been properly proven. This letter, in my opinion, fairly sets out the verbal agreement which I find was entered into at the time of the execution of the assignment, but the date at the foot of it, March 26, 1914, would probably imply an extension of time, and it is for this consideration that I refuse to receive the document.

Both counsel for the plaintiff and for the defendant have striven to take advantage of the cancellation notice and of the present defendant's prior suit against Dickson and the present plaintiff. In my opinion, there is nothing whatsoever in those matters that can affect the present issue either way.

The decree in the prior suit that all interest of Dickson and of the present plaintiff in the land be cancelled and foreclosed, is in no sense *res judicata* with respect to the present claim to recover the balance of the consideration for the assignment, which is an altogether different document containing a distinctly different agreement. As a matter of fact, the decree does not really affect the present plaintiff in any way, nor has the present defendant gained anything by joining him with Dickson in the suit; for the present plaintiff had no longer any interests in the land that could be foreclosed, as he had already made them over absolutely to the present defendant by the assignment. The decree, in declaring cancelled and foreclosed an interest in land which the present plaintiff had already assigned to the present defendant, really accomplished nothing at all.

The present plaintiff was not then a proper party to the prior suit in the aspect of foreclosure, but only with respect to his covenant contained in the assignment that he would make the payments under the agreement for sale in case of default by Dickson, and even then, that part of the action on which per-

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sonal judgment might be recovered, was abandoned. In consenting to, and in urging, foreclosure as far as he was concerned, the present plaintiff was in fact consenting to nothing and urging nothing that had any substance, as he no longer had any interest in the land, nothing that foreclosure could affect in any way.

Nor does it avail the plaintiff to urge that the defendant has secured by foreclosure certain interests in the land. That does not concern him, as that was Dickson's interest and not his own. From the moment that the plaintiff delivered the assignment, he no longer had any interest in the land, but only a personal claim for the $1,500 sued for herein.

The payment of this $1,500, however, was, as I have found, conditional upon either the plaintiff or Dickson paying the first instalment under the agreement for sale, which neither of them has done. Had the defendant's promise to pay the $1,500 been absolute, the plaintiff's acquiescence in the decree mentioned would in no way have affected his claim adversely; nor, on the above finding that the defendant's promise to pay was conditional, is the defendant's position affected in any way by his securing the decree and other matters in the prior suit. There is nothing in the aforesaid matters to disturb the fact that the condition was the payment of the instalment, and the plaintiff cannot, in lieu of this condition, substitute the fact that the defendant foreclosed Dickson's interest, or, putting it broadly, that he secured the land. The less so as the evidence shews that the reason for the condition, as it is, was to insure the payment of the instalment as a return on the investment and to guard as much as possible against having to take the land in satisfaction. The action should be dismissed with costs.

*Action dismissed.*

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SASK.

S. C.

## AVERILL v. CASWELL & CO. LTD.

*Saskatchewan Supreme Court, Haultain, C.J., Lamont and McKay, JJ. July 15, 1915.*

1. CHATTEL MORTGAGE (§ II A—7)—BONA FIDES OF CONSIDERATION—UNTRUE EXPRESSION OF—EFFECT ON SUBSEQUENT PURCHASERS.

A chattel mortgage given to secure a past indebtedness of $600 and a future advance of $100, the consideration expressed in the mortgage being "$700 in hand paid" while the actual indebtedness at the time being only $600 does not truly express the consideration as required by the statute, and will render the mortgage void as against subsequent purchasers and mortgagees in good faith.

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2. CHATTEL MORTGAGE (§ II A—7)—AFFIDAVIT OF OFFICER OF CORPORATION—PERSONAL KNOWLEDGE—FAILURE TO STATE—EFFECT.

An affidavit of *bona fides* of a chattel mortgage sworn by an officer of a corporation is defective if it fails to state, as required by sec. 24 of the Chattel Mortgage Act (Sask.), as enacted by ch. 67, sec. 22, of the statutes 1913, that the deponent is aware of the circumstances connected with the mortgage and has a personal knowledge of the facts deposed to.

3. CHATTEL MORTGAGE (§ II D—29)—INVALIDITY—SUBSEQUENT CHANGE OF POSSESSION—SEIZURE WITHOUT REMOVAL.

A mere seizure by a bailiff under a distress warrant on the maturity of a mortgage, without removing the goods from the mortgagor's control, does not amount to such an actual change of possession of the mortgaged goods as will cure a defective mortgage as against subsequent equities.

4. CHATTEL MORTGAGE (§ II A—7)—AFFIDAVIT OF BONA FIDES—SWORN BEFORE SOLICITOR—VALIDITY.

A chattel mortgage is not rendered invalid because the affidavit of *bona fides* is sworn before the solicitor acting in the matter.

[*Baker* v. *Ambrose*, 2 Q.B. 372, distinguished; *Barthels, Sheeran & Co.* v. *Winnipeg Cigar Co.*, 2 A.L.R. 21, referred to.]

Statement

APPEAL from a judgment for defendant.

*T. J. Blain*, for appellant.

*G. H. Barr*, for respondent.

The judgment of the Court was delivered by

Haultain, C.J.

HAULTAIN, C.J.:—This appeal involves the conflicting claims of the plaintiff and the defendant company under chattel mortgages given to them respectively by the defendant Mary Hill.

I have no hesitation in holding that the mortgage given to the defendant company was null and void as against subsequent purchasers or mortgagees in good faith for valuable consideration for the following reasons:—

According to the evidence, the mortgage was given to secure a past indebtedness and a future advance. Neither in the mortgage nor in the affidavit of *bona fides* is the consideration truly expressed. According to the evidence Mrs. Hill owed the Caswell Company about $600 at the time the mortgage was executed. While the consideration expressed in the mortgage is "$700 to him in hand paid at or before the sealing and delivery of these presents."

The mortgage was taken, according to the evidence, to secure the amount actually owing at the time, and a further advance of goods to the amount of $100.

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In the affidavit of *bona fides* William A. Caswell, described as "President of the firm of W. A. Caswell & Co. Ltd.," swears to an *actual indebtedness* of $700.

The affidavit of *bona fides* is defective in that while it purports to be made by W. A. Caswell in the above mentioned capacity, it does not state that the deponent is aware of the circumstances connected with the mortgage and has a personal knowledge of the facts deposed to, as required by sec. 24 of the Chattel Mortgage Act as enacted by ch. 67, sec. 22, of the statutes of 1913.

It is claimed, however, on behalf of the defendant company, that all these defects were cured by a subsequent taking possession of the property under the mortgage. The defendant company's mortgage was executed on August 24, 1914, and registered on August 26 and was due on September 15. The plaintiff's mortgage was executed on September 5, 1914, and registered on September 11, and was due on September 10. On September 11 the defendant company made a seizure of the mortgaged property. The seizure consisted in sending out a bailiff armed with a distress warrant, who informed the mortgagor that the wheat was under seizure, and, on her agreeing that the wheat would be sold for the benefit of the Caswell Co., left the premises and never returned.

During the interval between September 11 and 26 the wheat was drawn into the market town by the mortgagor and the "cash tickets" were handed over to the Caswell Co.

The evidence of the bailiff Johnston, while shewing a seizure, clearly shews an immediate abandonment of the seizure. He says:—

I acted as bailiff for the defendant company. Ex. 4 is the distress warrant. I recognize the mortgage ex. 3. Under the warrant I made a seizure on the place of Mary Hill. I seized wheat on section 31-19-13 W2nd. I recognize notice served on F. and M. Hill (ex. No. 1) by me. Hill was loading wheat. I told him my business and that the wheat in question was under seizure and I gave him the notice and then I served Mrs. Hill. I found the wheat on the premises in two granaries fairly full. Mrs. Hill agreed that Mr. Hill would haul the grain into town at once to pay off the Caswell mortgage, otherwise I would have stayed right there. After inspecting the granaries I came home.

On these facts it cannot, in my opinion, be said that there was any actual or continued change of possession. The wheat

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was left in the uncontrolled possession of the mortgagor in exactly the same position, so far as third parties were concerned, as it had been before the seizure was made.

The defendant company's mortgage must, therefore, be held to be null and void as against the plaintiff, who is a subsequent mortgagee in good faith for valuable consideration.

An objection was taken to the plaintiff's mortgage on the ground that the affidavit of *bona fides* was sworn before the solicitor who acted for him in the matter, contrary to r. 425, and the case of *Baker* v. *Ambrose*, [1896] 2 Q.B. 372, 65 L.J.Q.B. 589, was relied on. That case decided that Order 38, r. 16, which is the same as our r. 425, applies to affidavits made under the Bills of Sale Act, 1878. In England, however, under the last mentioned Act, bills of sale are registered or filed with the Masters of the Supreme Court of Judicature attached to the Queen's Bench Division of the High Court of Justice, or such other officers as are assigned for that purpose under the provisions of the Supreme Court of Judicature Acts, 1873 and 1875. The English rules of Court also make further provisions relating to the registration of bills of sale. Here, there is no such connection, and, in the absence of a specific application of the Rules of Court to Chattel Mortgages by the Chattel Mortgage Act, I am of opinion that they do not apply.

See also *Barthels, Shewan & Co. Ltd.* v. *Winnipeg Cigar Co.*, 2 Alta. L.R. 21.

The plaintiff's appeal should, therefore, be allowed with costs. The judgment appealed against will be set aside and judgment entered for the plaintiff against the defendants Mary Hill and W. A. Caswell & Co., Ltd., for $232.50, with interest at 5 per cent. per annum from September 5, 1914, and costs.

*Appeal allowed.*

CAN.

S. C.

## PRICE v. CHICOUTIMI PULP CO.

*Supreme Court of Canada, Davies, Idington, Duff, Anglin and Brodeur, JJ. March 15, 1915.*

1. LIBEL AND SLANDER (§ II C—25)—INJURY TO BUSINESS — CHARGE OF OBTAINING OTHER'S LANDS—USE OF POLITICAL INFLUENCE.

A publication charging a trading company with having used political influence for the purpose of procuring legislation giving it possession to lands in derogation of what, to its knowledge, were the property of the publisher of the charges, is an imputation calculated to injure the corporation in its business, and therefore actionable.

[Que. R. 22 K.B. 393, affirmed.]

2. LIBEL AND SLANDER (§ III C—111)—DEFENCES—JUSTIFICATION—FAIR COMMENT—BELIEF IN TRUTH—MISDIRECTION BY COURT.

In an action to recover damages for libel, a direction by the trial Judge to the jury that the defence of justification would be established if the defamatory statements had been made in honest belief of their truth, although in fact untrue, and that, if the publications were an honest comment on the facts, that, in itself, would be sufficient to establish the defence of fair comment, is erroneous and misleading.

[Que. R. 22 K.B. 393, affirmed.]

Statement

APPEAL and cross-appeal from the judgment of the Court of King's Bench, appeal side, Q.R. 22 K.B. 393.

*G. G. Stuart*, K.C., and *L. St. Laurent*, for appellant and cross-respondent.

*E. Belleau*, K.C., and *A. Taschereau*, K.C., for the respondents and cross-appellants.

Davies, J. (dissenting)

DAVIES, J. (dissented).

Idington, J.

IDINGTON, J.:—This is an action of libel brought by the respondent against the appellant founded upon the publication by the latter in three newspapers published in the Province of Quebec, of a letter written by him.

There was a private bill pending before the Legislature of Quebec promoted by the Town of Chicoutimi. This bill was so amended as to incorporate therein a declaration confirming the respondent's title to some grants made by the Crown.

The appellant in said letter recited the proceedings in the legislature which I need not dwell upon at length. In the course of his statements therein referring to this amendment he said:—

> Now a portion of the lands described in this paragraph never has been and is not now the property of the Chicoutimi Pulp Co., but is my property.

And then he proceeded to state the history of the amendment and commented thereupon as follows:—

The intention of the promoters was to obtain a legislative title to property which the Chicoutimi Pulp Co. pretended to own, but its title to which was manifestly so insufficient that it was afraid to submit it to the test of a legal decision.

I think the public must conclude that the Chicoutimi Pulp Co. had no confidence in their pretended title, otherwise the unheard of recourse to a declaratory law with respect to private property would have been unnecessary.

While the value of the land at issue may not be very great the principle involved in legislation of this character is of supreme importance to the public; not alone to those persons whose property the Chicoutimi Pulp Co. may covet, but to all people whose property may be coveted by others having sufficient influence to obtain legislation of this kind.

I may, however, add that I am advised that though the intention of the promoters is clear, it is doubtful whether the object has been attained, and I propose forthwith to test the question and if necessary carry it to the Privy Council; should I find that my property really has been transferred to the Chicoutimi Pulp Co., I shall come back to the legislature and ask that body to undo the injustice done and return the property stolen.

I suggest for the consideration of the public whether legislation of this character is not calculated to prove injurious to Canadian enterprise seeking capital on the English or foreign money markets. If companies can promote and carry legislation transferring to them other people's property, they can also promote and carry legislation by which creditors will be deprived of their security, or, if desired, of their recourse against their debtors. Is it reasonable under these circumstances to expect that capitalists will invest money in this province.

The respondent's action is founded upon the letter as a whole, but must rest upon these quotations.

Amongst many other things pleaded in defence the appellant alleged as follows:—

14. The letter published under his signature in the *Chronicle*, the *Montreal Star*, and the *Gazette*, was written and signed by him and was published at his request.

15. The statements of fact contained in the said letter are true in substance and in fact. . . . . .

18. This amendment was introduced without notice of any kind to the defendant or to the public and contrary to all Parliamentary rules, regulations and usages concerning private bills, and the persons who so introduced it intended thereby and the object of such amendment was to endeavour to obtain a statutory or legislative title to certain lands which did not belong to the plaintiff, but did belong to the defendant and which were in question at that time and with respect to which litigation was threatened. . . . . .

47. The defendant's letter was a fair statement of true facts referring to a matter of public interest and was a fair and *bonâ fide* comment, not only with respect to matters which the defendant had a right and an in-

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terest to make public, but a fair and *bonâ fide* comment on matters of public interest.

On the issues so joined the respondent as plaintiff was entitled to have the jury pass.

It is claimed, and I think with reason, that the learned trial Judge so misdirected the jury that the verdict obtained ought not to stand.

The Court of Appeal has set aside the verdict and directed a new trial. From that judgment this appeal is taken.

I am, with great respect, afraid that there was much misconception of law involved in the charge of the learned trial Judge on the trial of this simple issue, and hence that the complaint of misdirection which has been pressed is well founded.

I do not propose to enter in detail upon the manifold issues presented and the various misdirections of the learned trial Judge. Speaking generally thereof, however, he seems to me, I submit with great respect, to have confused the issues which ought to have been presented to the jury, and has thus been led into error. If any doubt existed as to the defamatory character of these statements, a further question should have been submitted to the jury whose province it is to pass thereon. Then if the issues presented by the pleadings justifying as true the parts which I have quoted of the letter complained of, and assumed to be defamatory, had been well and truly tried out and the truth or falsity thereof, or of material statements therein, first ascertained, matters would have been very much simplified.

The action was launched some ten years ago and the pleadings I quote from filed shortly thereafter. The appellant instituted, as threatened in said letter, proceedings to establish his title and followed same to the Privy Council and in these proceedings he failed entirely to establish the title he asserted. The trial of this action seems to have stood over awaiting the result of that litigation. It surprises one to find, in face of such a result (unless something new turned up afterwards which does not appear), the pleading of the defence of justification which I quote, still adhered to, instead of that assertion of title being withdrawn. A defence of justification involving

the truth in substance and in fact of an alleged libel is often a perilous sort of proceeding.

The appellant nowhere in his long pleading sets up specifically a claim of privilege but in law contends that what he does set up constitutes a privilege of some kind.

So far as reporting what actually transpired in the legislature or before its committees is concerned, that clearly is privileged. And so far as a fair and reasonable comment thereon is concerned that also was permissible; for to speak the thought we will, is the very life blood of our freedom and free institutions. In doing so, however, no one has the right to invent statement of fact and present it for truth. Nor has he the right in his comment to put forward what others may have invented, and publish that or aught else as fact which is false. No belief, on the part of one publishing any such comment, in such falsehood can justify its publication as part of his comment.

The reasoning used may be grossly fallacious and thus, in effect, a falsehood in itself, but of that the law will take no notice. In thus appealing to mankind they are supposed to be able to discriminate the true from the false if only the fundamental facts upon which the comment proceeds are shewn to be true.

It has been said by high authority that this right to comment should not be called a privilege. And as a matter of expediency it may be as well when we see how confused people get over the meaning of the term "privileged," to bear that observation in mind.

The comment must be fair, but much latitude has in practice been permitted, for wise men treat with silent contempt that which fair-minded men can, when nothing but facts are presented, adjust and correct for themselves. And thus the appellant, in dealing with the matter he had in hand, might have gone very far in his strictures upon private legislation of the character of that he was assailing. But he was bound in doing so to adhere to the truth so that such fair-minded men as he was appealing to might not be led astray. He could have presented to the public just exactly the nature of the claim he put before

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the legislative committee with the answer made thereto and asked his readers to decide relative to his appeal.

Such, as I have tried to set forth, I conceive was the law that ought to have been observed. Instead of that it seems to have been thought and, indeed, is urged before us that it mattered not in such circumstances whether what was stated was true or not, so long as it was honestly believed by appellant, and published by him in good faith. I am unable to hold that view of the law.

There are many situations in the commerce of mankind when it becomes the legal, social, or moral, duty to speak, and in doing so to give honest utterance to that which when it comes to be investigated may prove absolutely false, and in many cases he so speaking is privileged and protected unless he can be shewn to have been actuated by malice. But this is not such a case. And to confuse it with that class of cases in their various shades of absolute and qualified privilege is to mislead, and, when doing so in charging a jury, is to misdirect them.

The law is so well expounded by Lord Blackburn and others in the case of *Campbell* v. *Spottiswoode*, 3 B. & S. 769, and many cases following it, that I may refer those concerned to said exposition, and to other cases collected in Fraser on Libel and Slander, pp. 90-95.

For the purpose, therefore, of furnishing a bar to the action the investigation of the belief or good faith of appellant is of no avail.

As, however, in many other libel actions, there is in this an aspect of it which gives rise to the consideration of the question of the appellant's good faith and his reason for believing that he had a right to assert that he had a title to the lands he claimed as his. And that, if he thinks it worth while, he has a right to insist on the Court and jury hearing him in mitigation of damages. It cannot form in itself in such a case as this a defence barring the action.

I can imagine a man, wishing to justify himself before the public, using this right as means thereof even if only nominal damages asked at the opening of the trial, though I should doubt its expediency in a ten year old case.

In dealing with such investigation as was made on the trial relative to this question of the good faith and belief of the appellant, there seems also to have been much confusion of thought. And that was carried into the charge of the learned trial Judge to the jury. He seems to have treated the matter as if it were necessary to prove a contract in writing and to have held that, as there was no commencement of proof in writing, what was adduced of an oral character must fall to the ground. I submit, with deference, that it was the conduct of the appellant for years preceding his letter in relation to these matters alleged against him so far as shewn to be inconsistent with an honest belief in his assertions of a title possessed by him that bore upon the issues relative to such belief and good faith.

From that course of conduct inducing, as it was alleged, reciprocal conduct on the part of those he assails, even an agreement or understanding might have been inferred or submitted as a fair ground for an inference which forbade his honestly asserting such title as he set up.

I am by no means to be taken as asserting that such is the fair inference or conclusion to be reached. That was and is for the jury to consider. And it was for the learned Judge trying the case to have directed their minds to a fair consideration of such evidence of any kind shewing his conduct in its bearing upon this subsidiary question of the good faith of the appellant.

Again, I may point out that the last paragraph of the defence, being also the last of the three which I have quoted, couples together two or three matters which ought to be kept for consideration in the first place, quite independent of each other. The first part of the paragraph is apparently a repetition of paragraph fifteen, which must stand or fall by itself; and if it fall, then, in my view of the law which governs the case, that defence fails; and if that fails there cannot be maintained the further proposition of a defence of fair comment.

There has in such a case been a failure to maintain what the law recognizes as fair comment and imposes as a fundamental part of what constitutes fair comment.

Counsel for appellant submitted that no case had been made

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out and that the case should have been withdrawn from the jury and the action dismissed.

In my view of the law I need hardly say that I cannot assent to such a proposition.

He also took the objection, which is not set up in the statement of defence, that the respondent being a corporation cannot maintain such an action as this, under the existing circumstances attendant thereon, and resting upon such a basis as the appellant's letter furnishes.

I do not think there is anything in any of the decisions in the cases to which he has referred which can be held to maintain the objection. And I may frankly say that some *obiter dicta* I have observed therein do not seem to me maintainable. It would be short-sighted policy to try and so mould the law as needlessly to restrict the right of corporations to bring an action for libel.

In these days when corporations engage so much of the business activities of mankind and are daily assailed in the press, I think any one of them so attacked ought to have the power to assure the public on whom it relies for business that its conduct has not been that imputed in any such attack as this, for example.

Bringing an action for libel and putting him defaming any such entity to the proof is its only means of defence. To deprive any one of them of such right would be sure to tend to make their conduct worse instead of better. It is the public's highest interest to have as much publicity given to corporate dealings with the public as possibly can be brought about.

I think this appeal should be dismissed with costs.

As to the cross-appeal I think to allow it, even if good ground of complaint, which I do not find, would be to infringe on the settled jurisprudence of this Court relative to mere questions of costs. The cross-appeal should also be dismissed with costs to be set off against the other costs of the appeal herein.

Duff, J.

DUFF, J.:—In this case I regret to say that I see no escape from the conclusion that there must be a new trial. I regret it because all the facts were before the jury to enable them to pass upon the issues raised by the action and the mistrial arises only

because in certain vital matters they were not properly instructed by the learned trial Judge. The defences were justification, privilege and fair comment. It was not disputed on the argument that in an action for libel where, as here, the publication complained of deals with matters admittedly of public interest the rules of law applicable in the Province of Quebec do not sensibly differ from the rules of the law of England except in so far as they may be affected by statute, and there is no question of the application of any statute in this case. In effect, the learned trial Judge directed the jury that the defence of justification would be established if they were satisfied that the defamatory statements of fact were made with an honest belief in their truth, even though in fact untrue. He further directed them that if the publication was an honest comment that, in itself, would be sufficient to establish the defence of fair comment. As the learned Judges of the Court of King's Bench have pointed out in their judgments these directions were erroneous. The defence of justification fails unless the defendant justifies every injurious imputation which the jury find to be conveyed by the publication. The defence of fair comment fails unless the jury find that the imputation, although defamatory and not proved to be true, was made *fairly* and *bonâ fide* as the honest expression of the opinion held by the defendant and is, in the opinion of the jury, warranted by the facts in the sense that a fair-minded man might, on those facts, hold that opinion. It is also essential to this defence (as regards imputations which the defendant fails to prove to be warranted in fact) that he must have stated them not as facts but as inferences from other facts.

As there is to be a new trial I think it is undesirable to enter upon any discussion of the facts. But I think it is important to say this: The plaintiff is only entitled to succeed if the publication in question could convey to the mind of a reasonable person imputations calculated to damage the plaintiffs in their business. I think the publication is capable of such a meaning, that is to say, I think it is capable of being read as charging the plaintiffs with making use of their political influence in the legislature to procure the passing of legislation with the object

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of depriving the appellant of rights which they either knew to be vested in him, or believed might be vested in him, in respect of property which they desired to get for themselves; in other words, that they were unscrupulous enough to make use of their political influence to benefit themselves at the expense of the appellant's rights, or what, if his recourse to the Courts were not taken from him, might prove to be his rights. I think that would be an imputation calculated to damage them in their business. But it is a question for the jury whether or not the publication in fact bears that interpretation in the sense that that is the meaning which a reasonable person would attribute to it.

There is one further observation arising out of the course of the argument in this Court which it seems right to make and that is that the defendant is only bound to justify the publication (as regards his defence of justification) or support the publication as fair comment (as regards his defence of fair comment) in the sense in which the publication would be actionable; that is to say, in the sense in which it would convey an imputation prejudicially affecting the plaintiffs in their business. Failure to prove, for example, as a fact that the defendant was the owner of the property, while relevant, no doubt, could not be conclusive as regards either defence. Even assuming the jury should construe the publication as declaring absolutely that the appellant was the owner of the property, the gist of the imputation in the only sense in which it is actionable is that the plaintiffs oppressively or dishonestly made use of their political influence with the legislature to deprive the appellant of rights which they knew to be his, or his title to which, at all events, they did not think it safe to leave to the judgment of the Courts. If the appellant fails to justify that imputation in fact there is still open the defence of fair comment, the coefficients of which I have indicated above. But first of all, it is a condition of the plaintiffs' success that it should appear that the publication contains actionable imputations, that is, I repeat, imputations calculated to prejudice the plaintiffs in their business.

Anglin, J. (dissenting)

ANGLIN, J., dissented.

BRODEUR, J., for reasons given in writing, was of the opinion that the appeal should be dismissed.

*Appeal and cross-appeal dismissed with costs.*

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## FITZHERBERT v. DOMINION BED MANUFACTURING CO.

B. C.

C. A.

*British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher, and McPhillips, JJ.A. April 6, 1915.*

1. CORPORATIONS AND COMPANIES (§ V E 2—220)—ACTION BY SHAREHOLDER—RESCISSION OF STOCK SUBSCRIPTION—MISREPRESENTATION.

It is no answer to a shareholder's action against the company for rescission of the allotment to him of shares, for which he had fully paid, subscribed for upon a fraudulent misrepresentation of the company, for the latter to set up that at the time of action brought the company was in financial difficulties and that the interest of creditors had intervened, if the company has not been placed in liquidation, although an assignee had been appointed under the Sale of Goods in Bulk Act, R.S.B.C., ch. 204, to carry out the sale of its entire stock in trade.

[*Oakes* v. *Turquand*, L.R. 2 H.L. 325; *Tennent* v. *City of Glasgow Bank*, L.R. 4 A.C. 615, distinguished.]

Statement

APPEAL by defendant from judgment of Macdonald, J.

*Brydon-Jack*, for appellant.

*Abbott*, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The facts of this case, so far as they have been brought out in evidence, are that one Lynch, the agent of defendant to solicit subscriptions to its capital stock, induced the plaintiff, in June, 1912, to apply for 250 shares by falsely alleging that one Douglas had taken shares to the value of $3,000, when, in fact, he had not taken any. Subsequently, in October, 1912, the plaintiff applied for an additional 20 shares, which were allotted to him.

Before agreeing to apply for the 250 shares, the plaintiff intimated that he had not the cash in hand to pay for them. Lynch thereupon offered to obtain a purchaser, at the price of $10,000, for bonds of the Columbus Securities Co. which the plaintiff held. The plaintiff delivered the bonds to Lynch, together with his (the plaintiff's) four promissory notes for sums aggregating $2,500, payable to himself and endorsed by him in blank, which, with the bonds, would enable Lynch to find the $12,500 necessary to pay for the 250 shares applied for.

The written application signed by the plaintiff made no reference to the bonds and notes. At the same time, and on what appears to be one of defendant's forms, Lynch, as agent

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for defendant, acknowledged receipt of $12,500 in full for 250 shares in terms of the application, which was identified by a number corresponding to the number of the receipt. The receipt was headed "Temporary Receipt," and at the bottom were the following words: "All cheques or drafts must be made payable to the Dominion Bed Manufacturing Co., Ltd., when this application is given."

Some time later the plaintiff received from the secretary of the company certificates executed by the president and secretary certifying that he had been placed on the register of shareholders in respect of 250 shares.

Shortly before the commencement of this action plaintiff became aware that the shares were not allotted to him by the company, but were promoters' shares, which had previously been allotted to one Bereiter and belonged to him, and that the plaintiff's bonds and promissory notes or the proceeds thereof had never, unless Lynch's receipt of them could be deemed to be the receipt of the company, been received by the company. The defendant's minutes shew that plaintiff's application had come before the board of directors and was rejected, professedly because defendant would not accept the bonds and promissory notes in payment of the shares applied for.

Without any notification to the plaintiff of this refusal, the company afterwards, at the request of Bereiter, cancelled certificates for 250 of Bereiter's shares and re-issued them in the plaintiff's name, thus intentionally or ignorantly concealing the true nature of the transaction from him.

That Lynch and Bereiter, and perhaps Bereiter's co-directors, fraudulently colluded together to bring about this result may, in the circumstances, be suspected. Neither Lynch nor any of the persons connected with the manipulation of the shares, bonds and notes were called to give evidence. In the absence of such, it cannot, I think, be inferred that anyone other than Lynch acted fraudulently. The fact, however, is that the plaintiff's application to the defendants to be allotted 250 shares was not accepted, and no contract between them was made. Plaintiff's offer was not for the purchase of Bereiter's shares, and hence no contract between himself and Bereiter existed. In respect of these shares, therefore, the plaintiff is not a shareholder in

the defendant company, and his name is not properly on the register of shareholders, and he is, therefore, entitled to have it removed.

But the substantial relief which he claims is the return of his bonds or their value at the time they were delivered to Lynch, the return of the unpaid note, and the repayment of the moneys paid in respect of the other three notes which he had satisfied before action brought.

His right to this relief depends on whether Lynch is to be regarded as his agent for the sale of the bonds and notes, or as the defendant's agent to give an acknowledgment binding on defendant of the receipt of $12,500. There is no evidence that Lynch had authority or was held out as having authority to accept bonds or notes in payment of shares. Indeed, the company could not, because of a provision to that effect in the Companies Act, accept payment for shares except in cash. The arrangement between the plaintiff and Lynch for the sale of the bonds must, I think, be regarded as an arrangement between themselves by which Lynch became plaintiff's agent to make the sale. Therefore, the receipt of the bonds by Lynch was not the receipt of the bonds by the company. There is no evidence that the bonds were, in fact, sold; there is no evidence of what became of them. The manner in which the notes were drawn suggests the same relationship in connection with them. They were not made payable to defendant, but to the plaintiff, and endorsed by him in blank to enable, no doubt, Lynch to negotiate them. In his evidence the plaintiff endeavours to explain this by saying that Lynch told him the company needed money, that the bank would not discount their notes, and that these notes could be more readily discounted if drawn in the way suggested. This is a most illogical reason, but it is the only one given. I think the notes must be held to have been given in that way in contravention of the notice which appears at the foot of the receipt, which I have already recited. Plaintiff had notice that cheques and drafts were to be made payable to the defendant, and that should have warned him not to entrust Lynch with negotiable paper. In this view of the case the company never had possession of the bonds and notes, and, hence, there is nothing to make restitution of.

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As regards the 20 shares applied for in October, that transaction, I think, stands on a different footing to the one which I have just been considering. The plaintiff's application for the 20 shares was accepted by the defendant, and the shares were duly allotted and paid for. The plaintiff also claims rescission of this contract on the ground of fraud. The evidence is not very clearly directed to that issue, but the original fraudulent misrepresentation was never corrected—that is to say, when the plaintiff applied for and received the 20 shares, he was still entitled to rely upon the representation which had been made to him when he purchased the 250 shares, that Douglas had taken shares to the value of $5,000. There is no doubt that that representation was made by Lynch and that the defendant company was privy to it, and that it was calculated to and did induce plaintiff to apply for the 250 shares. No doubt there were other inducements offered to the plaintiff when he took the 20 shares, but I think it must be inferred that he acted, not only on these inducements, but relying on the representation which originally influenced him to become an applicant for shares.

In this view of the matter, the plaintiff is entitled to retain his judgment for rescission of the contract to take those shares, and he is entitled to have his name removed from the register of shareholders in respect thereof, and to have judgment for the return of $1,000 paid to the company therefor, with interest.

The defendant's counsel contended before us and in the Court below that, because it was in financial difficulties at the time or immediately after the commencement of this action, the plaintiff could not claim the relief of rescission, because the interests of creditors had intervened, and cited *Oakes* v. *Turquand* (1867), L.R. 2 H.L. 325; and *Central R. Co. of Venezuela* v. *Kisch* (1867), L.R. 2 H.L. 99, and other authorities in support of it. In my opinion, these cases have no application to the present case. It cannot be doubted that, as between shareholder and company, rescission may, and in a proper case ought to be decreed. The cases mentioned above were contests between shareholder and creditors represented by liquidator, not between shareholder and company. This plaintiff is not suing to have his name removed from a list of contributories—indeed, no question of contribution arises. It may be said that, if he is permitted

to recover judgment in this action for the return of moneys paid on account of shares, the plaintiff will claim to rank with other creditors in the distribution of a fund which is insufficient to pay the creditors in full, and in this way obtain an advantage repugnant to the principle of these cases.

I do not, however, think we have anything to do with that in this appeal. If the plaintiff should seek to rank with the other creditors, the liquidator has power to contest his right to do so. Then the question will be one between the plaintiff and creditors. I express no opinion as to what the result should be in such an issue. It is unnecessary here to do more than distinguish those cases from the one at bar.

In the result, the plaintiff is entitled to have his contract for the purchase of the 20 shares rescinded; to have his name removed from the register of shareholders in respect of these shares, and also of the 250 shares; he is entitled to judgment for the sum paid for the 20 shares, with interest, and with respect to the other relief claimed and given in the judgment below, the appeal should be allowed.

The appeal having partly succeeded and partly failed, there should be no costs, but the plaintiff should have the costs of the action.

MARTIN, J.A.:—In this action the plaintiff seeks to rescind the contracts for the two blocks of 250 and 20 shares, to remove his name from the register and list of shareholders, and for a return of his money, promissory note, and bonds. As regards the first block, the grave difficulty is that the trial Judge has found, as I understand his judgment (as it was open to him on the evidence), that, in plain language, the plaintiff was swindled, and that, by a conspiracy of some of the company's officers, certain promotion shares which had been issued to one of the directors, Bereiter, were surreptitiously and subsequently transferred to him in pretended answer to his application of July 3, 1912, for shares in the company, after that application (which involved the acceptance of the plaintiff's promissory notes and Columbus Securities Co. bonds) had been formally rejected by the board of directors at their meeting on July 18, 1912, and the proceeds of which fraud went directly into the pockets of the conspirators, instead of into the treasury of the company.

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As I view the transaction, it is simply this, that it was a fraudulent scheme by certain directors to rob the company as well as the plaintiff, and they succeeded in doing so. The application only came before the board of directors to be rejected, and so there was no acceptance of it and no contract. The effect of what was secretly done after that rejection is just the same, in principle, as if one or more directors had secretly taken blank shares out of the share book, filled them in, signed and sealed them and delivered them to an applicant in exchange for cash, which they put in their own pockets. It was not an act of the company at all which could estop it, but simply a private and independent piece of rascality, which the company, as such, had no knowledge of and which it was powerless to prevent. The result is that the plaintiff never had any contract with the company, and, therefore, there is nothing to rescind. His remedy is a personal one against those who conspired to defraud him, but he has no claim against the company, which has suffered as much as he has.

Then as to the second block of 20 shares applied for on October 3, 1912. They were paid for in cash, $1,000, to the company, and appear to have been regularly issued, but the learned trial Judge has found that the contract should be set aside for fraudulent misrepresentation, and I see no good ground for disturbing his finding. The only question that remains is the fact that the plaintiff did not bring this action till July 22, 1913, which is nearly a month after an assignee had been appointed, on June 25, under the provisions of the Sale of Goods in Bulk Act, ch. 204, R.S.B.C., to carry out the sale of the entire stock-in-trade of the company to one Barber, and it is submitted, on the authorities cited, chiefly *Oakes* v. *Turquand* (1867), L.R. 2 H.L. 325, and *Tennent* v. *City of Glasgow Bank* (1879), L.R. 4 A.C. 615, that it was then too late to rescind this contract to take the shares. I think, however, that the learned Judge was right in holding that the principle in those cases, which were between liquidators and shareholders, as to the right to remove names from the list of contributories, does not extend or apply to the circumstances of the present case, wherein the shareholder has fully paid for his shares, and no question is or can be raised as to putting him on a list therefor. Whatever rights, if any, the creditors of the company may have against him, they

do not stand in the way of his right to have the contract between himself and the company rescinded for just cause, and the judgment below in his favour should stand in that respect.

GALLIHER, J.A.:—I agree with the Chief Justice.

McPHILLIPS, J.A.:—With all respect and deference to the learned trial Judge, in my opinion it was not established by the evidence that Lynch was the agent for the company for the sale of 250 of the 270 shares issued to the plaintiff. With respect to the 250 shares, it was a transaction whereby the plaintiff was transferred 250 shares which previously stood in the name of E. W. Bereiter, and, under date August 26, 1912, the plaintiff gave a receipt therefor. It is contended that the plaintiff was unaware of this fact. Without entering into detail of how I arrive at a contrary conclusion, I unhesitatingly say that I do not give any credence to this contention.

The plaintiff applied to the company for the issue to him of 250 shares under date July 3, 1912, but no allotment was made. In fact, the application was refused, and in particular because of the fact that the plaintiff proposed to pay therefor as to $10,000 of the $12,500—the par value—by the transfer of 500 shares of the Columbus Securities Co.

The company had determined, on February 8, 1912, that J. B. Askew was to be the exclusive agent for the sale of $99,750 of the company's stock, on a commission to him of 25% on all stock sold, he being empowered to accept one-fifth of the purchase price in cash and promissory notes at 6% or 6% mortgages on real estate as security for the balance, the notes to run not exceeding 12 months and the mortgages for not longer than 5 years, or any negotiable security approved by the directors.

It is true that J. W. Lynch, purporting to act as the agent for the company, issued to the plaintiff, in respect of his application for the 250 shares, a receipt for $12,500, but the receipt was untruthful, and no such sum was paid to the company, and who was better aware of that than the plaintiff? The plaintiff did, it is true, turn over to J. W. Lynch 450 shares of the Columbus Securities and four promissory notes for $625—three of which notes have been paid—all of which, it would seem, were made to the plaintiff's own order, the plaintiff accepting as sufficient explanation that it was not desired that they should be

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made to the company, as its line of credit with the Bank of Montreal, its bankers, was exhausted, and it was not desired to make the transaction known to the bank, but the notes would be realized upon, independent of the bank—an explanation which, then and there, should have aroused the plaintiff's suspicions, if it was the fact that he was embarking in this transaction in good faith and not lending himself to the flotation of a company which was clearly, as the evidence shews, being manipulated by men devoid of principle or honesty. Upon the very receipt accepted by the plaintiff is this statement:—

All cheques or drafts must be made payable to the Dominion Bed Manufacturing Co., Ltd., when this application is given.

The circumstances surrounding this application for the 250 shares are so suspicious in character that I cannot give credence to the plaintiff's testimony. I cannot believe that he was unaware that his application, as made, was refused by the directors, and that not until the month previous to this action being brought did he become aware that he had been transferred shares that previously stood in the name of E. W. Bereiter.

It is to be noted that upon the application made for the 250 shares there is this statement: "The company reserved the right to reject all or any part of this application."

The application for the 250 shares was made on July 3, 1912, and on July 11, 1912, we have the plaintiff writing a letter to the company in the following terms:—

Vancouver, B.C., July 11, 1912.

THE DOMINION BED MANUFACTURING CO., LTD.,
1116 Dominion Trust Building, City.

Dear Sirs,—

I have subscribed for two hundred and fifty shares in your company, as I believe that the bed which you will turn out will prove to be a better and a simpler bed to erect than any other bed on the market, and I have no doubt that there is great scope for such an industry in Vancouver, and that a large field can be tapped from Vancouver.

With sufficient capital to commence operations and able management, I consider that a most successful future is in store for the Company.

Yours truly,
C. H. FITZHERBERT.

The plaintiff would appear to be very willing, and at a very early date, to lend his name to the exploitation of the company, and, no doubt, to aid in inducing others to invest in the shares of the company, and it would appear that his profession or business is that of financial agent.

On August 8, 1912, J. W. Lynch issues a receipt to the plaintiff for the further 50 shares of the Columbus Securities Co., making, in all, the 500 shares, and on August 8, 1912, the plaintiff receives two certificates from the company, covering 250 shares in the company—one for 50 shares and the other for 200—and signed receipts therefor, which, as they appear in the appeal book, shew that the shares were shares previously held by E. W. Bereiter—*i.e.*, it is contended that the receipts were separated from that which goes before, and afterwards pasted on—no doubt that appears to be so—but again I cannot give credence to this contention and that the plaintiff was unaware of the actual facts. I am impelled to hold that he was conversant with the fact that he had had transferred to him shares previously held by E. W. Bereiter.

It is to be noted that the plaintiff, in purchasing shares in the company, went upon the advice of his partner, Mr. Weller, who made an investigation of the business affairs of the company, and it was only after this investigation was had that the plaintiff decided to purchase shares in the company, and on July 11, 1912, eight days after his application, he wrote the letter above quoted.

It was admitted, upon the argument of the appeal, that Lynch was not acting for the company when he undertook to sell the stock of the Columbus Securities, but for the plaintiff. We find the plaintiff making this statement in examination in chief:—

> He (Lynch) was in a great hurry. He said that he would agree to the disposal of this stock and would sell it and buy this other stock in the Dominion Bed Manufacturing Co.

And Mr. Weller, who had advised the plaintiff, was present on this occasion. This all indicates that Lynch was clothed with authority by the plaintiff to carry through a transaction of sale of the stock of the Columbus Securities, and purchase, on behalf of the plaintiff, shares in the Dominion Bed Manufacturing Co. To accomplish this some time would necessarily elapse, and the plaintiff apparently never obtained the certificate for the 250 shares until August 26, 1912. If the position of matters was as the plaintiff wishes it to be understood, why this long delay from July 3 to August 8, 1912, before the certificates issued? It can only be explained upon the footing that Lynch was to in some way dispose of the Columbus Securities' stock and procure shares

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in the Dominion Bed Manufacturing Co., not by way of the application for shares to the company, but from some holder of shares in the company.

Then we have the plaintiff, on October 3, 1912, making a further application for 20 shares in the company, but this application is at once acted upon by the company, and a certificate issues under date October 4, 1912.

Then on October 7, 1912, the plaintiff writes the following letter:—

Suite 417 Metropolitan Bldg.,
Vancouver, B.C., October 7, 1912.

J. B. ASKEW, Esq.,
Secretary-Treasurer,
The Dominion Bed Manufacturing Co. Ltd.,
Dominion Trust Building, City.

Dear Sir,

Having made further investigations with regard to the possibilities of future developments for the manufacturing of the bed for which you hold the patent rights, I believe that the Company should prove very successful and pay good dividends to shareholders. I have, therefore, arranged for the increase of my holding from $12,500 to that of $20,000. I also trust that I may be of service in the extension of your business, as good manufacturing concerns are needed in this city.

Yours very truly,
CECIL H. FITZHERBERT.

What is the explanation of this letter? It would not appear that there is any explanation. All that can be said is, that it would appear that the plaintiff was ready and willing to make a statement presumably to be used to induce others to have confidence in the company and to invest in its shares, and the statement that he had increased his holdings to $20,000 was wholly untrue; but now the plaintiff seeks in this action, when the company is in liquidation and unable to pay its debts in full, to have set aside, upon the ground of misrepresentation and fraud, his business transactions with the company, and to have returned to him moneys paid and the securities handed over or the value thereof, and that he should not be in any way a contributory or in any way responsible for the liabilities of the company.

Further, the plaintiff, in the taking of the additional 20 shares, did so in consideration for or in connection with his becoming a director of the company, and he was appointed a director, but went to England for some time, and apparently was quite

careless of the affairs of the company, or, at any rate, rendered himself by his absence unable to give any attention to his duties as such, and yet he is contending that he never knew of the rejection of his application when he proposed to transfer the ten thousand shares of the Columbus Securities Co. to the company in connection with his application for shares or the worthlessness of the shares proposed to be transferred in this connection, and as to the moneys paid on the promissory notes the plaintiff made the following statements under cross-examination:—

Q. Now when was it that you told Mr. Weller to inspect the books and see about the affairs of the company? A. Do you mean the last time? Q. The first time. A. After we had seen the condition of the property then we arranged that Mr. Weller should have—could look over the financial condition of the company. Q. What date was that? A. That must have been early in July or the latter end of June. Q. That was after you put in your application? A. No, before. Q. Before you put in your application. You never had any difficulty at any time in inspecting the books. They were always open for inspection any time that you wanted to look at them, weren't they? A. I never went to inspect the books myself. Q. Whenever you sent anybody to inspect them? A. We only sent at that time. Q. I thought you said Mr. Weller went twice. The last time was when? A. He went down to the factory after I came back from England. Q. There was never any difficulty in inspecting the books? A. The second time they wanted us to finance them, so they turned the books over to us. Q. You never asked to inspect them? A. No. Q. It was sort of conditional on your taking this extra thousand dollars worth that you were appointed a director? A. It was more or less. Q. You knew that you were going to be appointed before you left for England? A. I thought I would be. I thought I would probably be appointed. Q. That was the understanding? A. Yes. Q. You didn't make any investigation then as to the books or status of the company at all? A. No. Q. You were quite content to accept the position without any inquiry at all? A. I thought everything was going along well. Q. There was a minute here—I don't know whether it was referred to before—in which your application for shares was dealt with and refused? A. I never knew anything about it. Q. Did you find it out afterwards? A. Not till 19—just before the company stopped in 1913.

MR. ABBOTT: I am going to put this book in, my Lord, if my learned friend wants to ask about it.

MR. BRYDON JACK: Q. Page 12: "The further business coming before the Board of Directors was the question of whether or not the Dominion Bed Manufacturing Company, Limited, would accept ten thousand shares of stock in special income certificates bearing 7 per cent., issued by Columbus Securities Company in exchange for their stock, together with $2,500 in promissory notes, and Mr. Bereiter moved that same should not be accepted by the Dominion Bed Manufacturing Company, Limited, and it was seconded by P. B. Askew, and carried." That is the reference to that. A. I know nothing about it.

MR. ABBOTT: These certificates refer to your Columbus Securities? A. They do in the minute book apparently.

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MR. BRYDON JACK: Isn't it a fact that these Columbus share certificates were of no real value? A. No, not at that time. Q. They have since turned out to be of no value? A. No.

THE COURT: Q. What, the Columbus?

MR. BRYDON JACK: Yes, these shares that were turned over by Mr. Fitzherbert—when were you first informed that they were of new value? A. It was sometime afterwards. They had dividends of 7 per cent. coupons attached. They paid dividends after that time. I paid ten thousand dollars cash for them. Q. Who informed you that they were of no value? A. I got that from—I think it was Mr. Draper. I never heard anything in the company at all. It was some outside source. Q. Hadn't you your doubts at the time of this transaction? A. At the time I turned this over I bought Empire Life Insurance, for which I paid ten thousand dollars, and that company was absorbed by the Columbus Securities, and they gave seven per cent. securities in place of Empire Life shares, making a different investment altogether from what I intended originally. Q. You didn't answer my question. Was it as a result of this turn over that you began to be impressed about the value of these securities? A. I didn't care for the turn over. It was not at all what I intended originally. This concern was operating in the West, and this other was an Eastern organization and it was altogether different from what I anticipated. Q. And you were rather anxious to get rid of that? A. At the time I didn't think about it at all until Lynch came and broached the matter to me. Q. You thought there would be a chance to make a deal. You thought you could deal with them. You knew they went to the Askew estate? A. I don't know where they went. Q. You know now? A. Yes, I know they must have gone there. Q. You know now that all the consideration of the four notes was paid over to Bereiter or Askew? A. I don't know who got the money, but it must have gone to some of them. Q. It didn't go to the Dominion Bed Manufacturing Co. anyway? A. No, it didn't go to the Dominion Bed Manufacturing Co.

At the trial of the action, counsel for the plaintiff took the position that the officers of the company were scoundrels, only excepting the plaintiff. It is a pertinent question if the plaintiff has not put himself into the position, considering all the surrounding facts and circumstances, of not being entitled to now complain? In my opinion, this is not a case in which rescission should have been ordered, but a proper case in which to hold that the plaintiff must be considered to be the holder of the shares standing in his name, with no right to the return of any of the moneys paid; that as to the Columbus Securities Co. stock, that was a transaction in which Lynch was the agent for the plaintiff, and the company cannot be in any way connected with that; and as to the promissory notes, these apparently were never made payable to the company or went to the company at all, and the company cannot be charged with any liability in respect thereof.

With respect to the receipt given for $12,500 by Lynch, presuming to act as the agent of the company, all that is necessary to be said is this, that the facts disprove the payment of any such sum as $12,500, and the plaintiff cannot rely in any way upon the receipt. With respect to what payments have been made by the plaintiff upon the shares held by him, that will be a matter for the liquidator of the company, and as to whether he should not be placed upon the list of contributories.

In arriving at this conclusion, I may say it is based upon my view of all the facts and circumstances, and, in my opinion, the plaintiff was not misled by any false statements made by Lynch as to Douglas being a subscriber for stock in the company. He took steps to investigate the affairs of the company, and he was not induced or materially influenced by any false statements for which the company is chargeable to part with any of the money paid by him. The plaintiff, in examination-in-chief and to his own counsel, made answer as follows:—

Q. At all events on the strength of what Mr. Weller told you at the time you invested? A. Yes.

And it was Mr. Weller who had made the investigation of the affairs of the company at the request of the plaintiff.

The plaintiff has not discharged in a satisfactory manner, in my opinion, the onus which was upon him, and that was, that it was upon the false and fraudulent representations of Lynch that he was induced to become a shareholder in the company. Further, in my opinion, he comes too late. No proceedings were taken by the plaintiff to rectify the register or for the removal of his name from the list of shareholders, and this action was only commenced on July 22, 1913, and on September 16, 1913, a resolution was passed at an extraordinary general meeting for the voluntary winding-up of the company, and confirmed on October 2, 1913; and when it is considered that the plaintiff was the holder of 250 out of the 270 shares from August 8, 1912, and of the remaining 20 shares from October 3, 1912, can it be reasonably said that the plaintiff may now be heard in support of the contention made by him? In my opinion, the authorities are against his being so admitted to be heard. Stirling, J., at pp. 325, 326, *Carling* v. *London and Leeds Bank* (1887), 56 L.J.Ch. 321, said:—

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Applying the rule laid down by Lord Cairns that the question whether or not a contract to take shares can be rescinded before the commencement of a winding up must depend upon the particular circumstances of the case, let us see what the particular circumstances of this case are. The facts are set forth in a short affidavit of the liquidator.

His Lordship reviewed the liquidator's affidavit and continued:—

That is all. It is not said that the applicant had any knowledge of these circumstances. In the first place are there any countervailing equities which ought to prevail against this right in equity to have his name removed from the register? One class of cases is where the name of the shareholder has been for a long time upon the register. That is not conclusive. But it is possible to suggest that people may have made advances on the faith of the name of that particular shareholder being on the register.

And in the present case the plaintiff is a financial agent in active business in Vancouver, where the company carried on its business, and, further, he became a director of the company; and the company embarked in a large way of business and incurred very considerable liabilities, and so far in the winding-up proceedings 40% has been paid to the creditors, and if the plaintiff is held not to be entitled to recover in this action, there will remain about 25% more for distribution amongst the creditors of the company. In my opinion the "countervailing equities" are paramount in the present case.

In *Stone* v. *The City and County Bank, Collins* v. *Same* (1877), 47 L.J.P.C. (C.A.) 681, Bramwell, L.J., at p. 695, said:—

I think I have touched on every point. In the result then I am of the opinion that this claim is just on the footing of rescinding, and that there is a good voluntary winding up. I am of the opinion that the case of *Oakes* v. *Turquand* (1867) 36 L.J. Ch. (H.L.) 949, L.R. 2 H.L. Cas. 325, shews that where there is a winding up, whether voluntary with or without supervision, it is too late for a person who has been defrauded into becoming a shareholder to rescind. I am of opinion that that case shews not only that the name must be on the register, but that it is too late to rescind. Upon these grounds I am of the opinion that this voluntary winding up is good and upon the authority of the case of *Oakes* v. *Turquand* this action based upon the footing of recovering the consideration money back fails and that our judgment must be for the defendants.

The cases undoubtedly shew that, once upon the register, the shareholder must be vigilant to escape liability in respect of the shares held by him. Lord Cairns, in *Re Cachan Co.*, L.R. 2 Ch. 417, said:—

It is impossible to disembarrass these cases of the effect which a man's name being on the register has in inducing other persons to alter their position.

Now, the plaintiff, when he came back from England, in April, 1913, became aware of the bad condition of affairs of the company, and certainly in the month of June, 1913, becomes aware of the fact that, as to 250 of the shares held by him, they were shares transferred from Bereiter, but he does not commence action until July 22, 1913. Upon this point there are several cases, and a very short delay is held to disentitle the shareholder to relief—a delay of a couple of weeks being fatal. See *Re Scottish Petroleum* (1883), 23 Ch.D. 430; *Taite's Case* (1867), L.R. 3 Eq. 795; *Peel's Case* (1867), L.R. 2 Ch. 674; *Skelton's Case* (1893), 68 L.T. 210.

Further, in this case there was long delay, and, if not knowledge, the means of knowledge were available to the plaintiff. See *Ashley's Case* (1870), L.R. 9 Eq. 263; *Scholey* v. *Central R. Co. of Venezuela* (1870), 9 Eq. 266*n*.

Upon the whole, in my opinion, the plaintiff failed to establish the action as brought, namely, one for rescission, and if I should be in error in this view, the action was brought too late. I would, therefore, allow the appeal. The action should be dismissed, the defendants to have the costs in the Court below and the costs upon this appeal.

*Appeal allowed in part.*

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## McINTYRE v. PREFONTAINE.

MAN.
C. A.

*Manitoba Court of Appeal, Howell, C.J.M., Richards, Cameron, and Haggart, JJ.A. July 23, 1915.*

1. CHATTEL MORTGAGE (§ IV B—45)—REMOVAL OF MORTGAGED CHATTELS—RIGHTS OF SUBSEQUENT PURCHASERS—PRIORITIES.

The failure to re-register a mortgage in the district where mortgaged animals are removed within six months of their removal as required by the Bills of Sale Act (Man.), does not give a purchaser a better title to them as against the mortgagee where the purchase is made before the expiry of the statutory period.

[*Hodgins* v. *Johnston*, 5 A.R. (Ont.) 449, applied.]

Statement

APPEAL from the judgment of the trial Judge in an action of replevin.

*A. E. Hoskin*, K.C., for appellant, plaintiff.

*W. Boston Towers*, for respondent, defendant.

The judgment of the Court was delivered by

Richards, J.A.

RICHARDS, J.A.:—Theophile Meron, in April, 1914, mortgaged to the defendant two horses, which, at the time of the execution

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of such mortgage, were within the judicial division of the County Court of Morris. The mortgage was registered in the office of the clerk of that County Court.

In June, 1914, Theophile Meron's son, Joseph, was allowed by the mortgagor to use the horses in his business as a peddler of medicines. Whether he was to do such peddling in the above judicial division, or in that of the County Court of Carman, or in both, does not appear. The only evidence on the point is that of his brother Hildege Meron who says, referring to Joseph:—

He just simply got those horses with our consent to go out in that district to peddle some medicine.

As no district is previously referred to in Hildege's evidence, one can only presume that the "district" referred to would be the territory within such a distance from the Meron family home as could readily be travelled with a team of horses having their headquarters at that home. The evidence is vague as to where Joseph lived while so peddling, but what there is suggests that it was at the family home.

There is no evidence to shew, until July 21, 1914, what Joseph in fact did with the horses or how far he travelled with them or where they were usually kept after he got the consent to his using them. On July 21, 1914, Joseph sold the horses to Mr. T. L. Beaudry. It appears that Beaudry first met Joseph, and saw the horses in Carman. But the place where he bought the horses from Joseph is not stated, though it was probably at or near Carman.

In the following October, Beaudry sold one of the horses to the plaintiff; and in the first week of the then next January he sold him the other.

Apparently from the time of the sale to Beaudry the horses were kept in the judicial division of the Carman County Court.

In January or February, 1915, the defendant, as mortgagee, took possession of the horses, and on February 18, the plaintiff brought this action of replevin in the County Court of Carman.

The learned trial Judge gave judgment for the defendant for a return of the horses, and from that judgment the plaintiff appeals as to the horse sold him in January.

The ground of the appeal is that the mortgage was not registered, as provided by sec. 38 of the Bills of Sale and Chattel Mortgage Act, in the office of the Clerk of the County Court of

Carman within six months after the permanent removal of the horses to the judicial division of the last named County Court.

The "permanent removal" can not in any case be held to have happened before the sale to Beaudry on July 21, and the 6 months from that date had not expired when the last of the horses was sold to plaintiff in the first week of the following January.

I understand the protection of section 38 to only extend to purchasers who buy after the expiry of the six months. That principle was laid down in *Hodgins* v. *Johnston*, 5 A.R. (Ont.) 449, where animals, sold during the continuance in force of a chattel mortgage which covered them, were successfully claimed by the mortgagee after the time for renewal of the mortgage had passed without its being properly renewed. It was held that the right to seize the animals accrued to the mortgagee at the time they were sold, and that once it had vested he did not lose it by letting the time for renewal expire before he exercised that right. I express no opinion as to any other points raised in the case.

I would dismiss the appeal with costs.

*Appeal dismissed.*

## BEAMISH v. LAWLOR.

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*New Brunswick Supreme Court, McLeod, C.J. August 20, 1915.*

1. BAILMENT (§ I—7)—MONEY PLACED FOR SAFE KEEPING—RIGHT TO FOLLOW FUNDS—DEPOSIT IN BANK.

Money placed with one for safe keeping creates a bailment not a debt and may be followed up by the bailor in the bank where the money had been deposited in the bailee's name.

2. TRUSTS (§ II B—52)—RIGHT TO LAND PURCHASED WITH TRUST FUNDS—MORTGAGE BY TRUSTEE TO CESTUI QUE TRUST.

Real estate purchased by a trustee with funds held in trust, but with knowledge of the *cestui que trust* and secured by a mortgage in the latter's favour in a sum exceeding the purchase price, does not entitle the *cestui que trust* to a declaration of title to the land in his favour.

3. BAILMENT (§ II—10)—GRATUITOUS BAILMENT—RIGHT OF BAILEE TO COMPENSATION—EXPENSES.

A gratuitous bailee entrusted with money for the purpose of safe keeping is entitled to travelling expenses and costs of exchange incurred in the performance of the trust, but cannot recover any commissions or charges for services performed therein.

Statement

ACTION for injunction, declaration of trust and an accounting.

*Daniel Mullin*, K.C., and *R. F. Quigley*, K.C., for plaintiff.

*W. B. Wallace*, K.C., and *J. A. Barry*, for defendants.

McLeod, C.J.

McLEOD, C.J.:—Two actions were brought in this Court by the plaintiff against the defendant. The first was brought in

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March, 1914, against the defendant and the Bank of Nova Scotia, claiming $5,000. In this action the plaintiff alleged that she had given the defendant $5,000 for safe keeping, which the plaintiff alleged that the defendant had appropriated to her own use, and the plaintiff further claimed that a part of said money was in the Bank of Nova Scotia at the credit of the defendant, and she asked that that amount be paid to her, and an injunction was granted against the Bank of Nova Scotia to prevent it from paying to the defendant or to anyone the amount so in the bank at the credit of the defendant.

The second action was brought on April 9, 1914, asking that a lot of land on Douglas Ave., in the city of Saint John, with a house on it, be declared to belong to the plaintiff, and an injunction was granted to prevent the defendant from making any transfer of the property, and the plaintiff further asked that the defendant account to her (the plaintiff) for the sum of $12,083.24, which the plaintiff had intrusted to the defendant for safe keeping, with the accumulated interest thereon, and the plaintiff further alleged that the said house on Douglas Ave. had been purchased by the defendant with a part of the said $12,083.24.

At the hearing I ordered the suits to be consolidated as I thought they could be more conveniently tried together.

The plaintiff was the wife of one John Beamish, who was a butcher by trade, and kept a butcher shop at 229 Haymarket Square in the city of Saint John. He died early on the morning of July 3, 1910. Prior to his death he transferred all his property to the plaintiff. He gave her a deed of the property he occupied at Haymarket Square in May, 1910, and also an absolute bill of sale of all the personal property he had there. He had on deposit in the Bank of British North America something over $12,000 in money. He gave that money to the plaintiff and transferred it into her name, and at the time of his death it was on special deposit in the plaintiff's name. The plaintiff also alleges that Mr. Beamish had in his house $5,500, and that shortly before his death he counted that money and handed it over to her and told her to keep it as her own. The plaintiff and defendant at this time were strong personal friends, and I gather from the evidence that the defendant was at the plaintiff's house very frequently, she was there at the time of Mr. Beamish's death.

Mr. Beamish died on a Sunday morning, and the plaintiff says that at about nine o'clock that morning she took this $5,500 that was then in the house, and gave it to the defendant and asked her to keep it for her, and the defendant took it from the house in a small satchel or bag that the plaintiff had it in. The plaintiff was Mr. Beamish's second wife, and they had one son, who at the time of Mr. Beamish's death was about 16 or 17 years of age. Mr. Beamish had then living one daughter by his first wife, who was married to a man named Ross, and one grandchild living, who was a son by another daughter deceased. Mr. Beamish made no will. Some time in the early part of September, 1910, Mrs. Beamish received a letter from a lawyer with reference to the property left by Mr. Beamish. The letter is not in evidence, but I gather from what was said that by it legal proceedings were threatened against her on behalf of this daughter and grandchild. The plaintiff and the defendant went to the office of the late Mr. W. W. Allan, who had been Mr. Beamish's solicitor, and showed him the letter, and the plaintiff says in her evidence (and with this the defendant, who was present, agrees) that Mr. Allan advised her to draw this money from the Bank of British North America and take it to Boston or somewhere else as there might be an injunction issued to restrain her from drawing it from the bank and these heirs might make trouble. She accordingly withdrew the money from the bank; the defendant being with her when it was so drawn. The plaintiff did not care to leave town at the time, and she asked the defendant to go to Andover, Massachusetts, and see a brother she had living there, and to deposit the money in a bank there (she says she told her to deposit it in her—the plaintiff's—name). The defendant took the money drawn from the Bank of British North America, and went to Andover, saw the plaintiff's brother, and deposited the money in the Bay State National Bank of Lawrence, Massachusetts, in her own name. The money as she took it was in Canadian bills; she carried it in a satchel with her, and deposited it in the bank. The amount, less the discount on Canadian bills, that she so deposited was $12,083.24. It was deposited at 3% interest. The defendant then went to Boston and deposited $5,000 with the American Trust Co., also in her own name. It is quite evident from the evidence that this money was also

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in Canadian bills, and the plaintiff claims it is a part of the $5,500 she gave the defendant in July, 1910.

The first question to be determined in this action therefore is whether the plaintiff did give the defendant this $5,500 to keep for her in July, 1910. If she did so give it to her the defendant has never returned it or any part of it or accounted for it.

Dealing with this question: the plaintiff's statement is that on Sunday morning, July 3, shortly after her husband's death, she took this $5,500 and handed it to the defendant and told her to keep it for her. After stating that her husband died about five minutes to one on Sunday morning the plaintiff says as follows:—

> Well, Sunday morning about nine o'clock I took it (that is the money) out of the trunk, and I called Miss Lawlor into the room and I said, Miss Lawlor, I have some money in this bag here. There is over $5,000 in it, and I said I want you to keep it for me for a while; and she said she would, and it was in a leather bag, and she put it in the bag on her arm, and she asked me for a little shawl, and she threw it over her arm and she went home, and I never saw it since.

She says that she asked her for it several times, but the defendant gave her different replies. She at one time told her that she, the plaintiff, did not want to know where it was, but did not return it to her. The defendant denies that she received the money.

The question is one of fact, that is, did the plaintiff give this money to the defendant to keep for her or not? There are only two witnesses to the transaction, the plaintiff and the defendant. The first question is: Was this money in Mr. Beamish's house? It seems like a large amount of money for a man to keep in his house, but having heard both the witnesses, and examined the evidence, I have concluded and find that Mr. Beamish did have that amount of money in his house at the time of his death. The plaintiff's evidence is positive that shortly before Mr. Beamish's death he called her into the room, and asked her to bring in the money that was in the trunk. She unlocked the trunk, and brought the bag that the money was in and handed it to him, and he opened the bag, and he and she counted the money on the bed, and there was $5,500. He put it in the bag and handed it to her, and told her to keep it for herself. I therefore have concluded that this amount of money was in Mr. Beamish's house, and that he gave it to the plaintiff, and I also

find that the plaintiff did on July 3 hand that money to the defendant to keep for her. The plaintiff and the defendant appear to have been very close friends, and I can understand that under the circumstances the plaintiff did not care to keep this money in the house herself, and she gave it to the defendant to keep for her. The defendant at that time was living in rooms on Main St., Portland. She herself does not appear to have had any money of any account. She undoubtedly did in September of that same year when she went to Andover with the $12,000 take at least $5,000 with her in addition to the $12,000, and after making the deposit in the bank at Lawrence she went to Boston and deposited $5,000 to her own credit with the American Trust Co. The $12,083 was deposited by her in the Bay State National Bank at Lawrence on September, 13, 1910. The defendant's explanation as to where she obtained the $5,000 that she so deposited is entirely unsatisfactory, and I cannot accept it as correct. She says in the first place that Miss McGolderick, now deceased, gave her $2,500 to use for charitable purposes. She cannot remember when it was given her, but says it was some time before this deposit was made; she cannot at all fix the time. She says it was given in two different amounts, but cannot tell what the different amounts were, and really can give no explanation why Miss McGolderick should give her this amount of money. She says Miss McGolderick gave her this money to use for charitable purposes in any way that she pleased. It does not appear that she used or attempted to use any of it for charitable purposes. I heard the defendant's evidence given, and have since read it carefully, and I am obliged to say that I cannot credit her statement. She says that in addition to the $2,500 she had $3,500 of her own money, and that she always kept all this money in her own house, but in her examination she can give no explanation, at least no satisfactory explanation, as to where she got the $3,500. She appears to have been without means, and I am obliged to discredit her statement.

I therefore find as a matter of fact that the plaintiff did give the defendant the money that was in Mr. Beamish's house at the time of his death, which I find to be $5,500. This money the defendant appears to have kept in her rooms, and I find that

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the $5,000 which the defendant took to Boston and deposited in the American Trust Co., was this money belonging to the plaintiff. The defendant from time to time drew from that money so deposited with the American Trust Co. different sums which she apparently used for her own purposes. On June 19, 1913, she drew $3,958.28, which on June 21 she deposited with the Bank of Nova Scotia, less $502.75, the amount of two notes which she had previously given that bank, leaving a net amount of $3,555.53, which she on that day placed in the Bank of Nova Scotia to her own credit. The account with the American Trust Co. was finally closed on April 16, 1914, when she drew the small balance remaining of $31.08. Of the amount she deposited in the Bank of Nova Scotia she drew out for her own purpose all except $1,996.61, which is now to her credit in the Bank of Nova Scotia. This money I find as a matter of fact is part of the money that was given by the plaintiff to the defendant to keep for her. The defendant in fact took the very money the plaintiff gave her, deposited it with the American Trust Co. in Boston, drew out different sums from time to time and used them for her own purposes, and finally on June 19, 1913, drew out $3,958.28, of which she deposited to her own credit in the Bank of Nova Scotia, $3,555.53. It was contended on behalf of the defendant that if the plaintiff's statement that the money was handed to the defendant is true, still there was no trust connected with this money, and therefore it was a simple debt, and the plaintiff could not follow it. I think there was a trust connected with it. I think the defendant was handed the money simply to keep for the plaintiff. When she took that money to Boston and deposited it there in her own name she committed a breach of trust. She was simply a bailee of the money, and the plaintiff would have been entitled to have claimed the money so deposited in the American Trust Co. as her money, and the fact that the defendant transferred it, or a part of it, from the American Trust Co. to the Bank of Nova Scotia, does not prevent the plaintiff from following that very money, and therefore, in my opinion, she can trace the money, and has traced it, and is entitled to have so much of it as is still in the Bank of Nova Scotia at the credit of the defendant paid over to her.

The second question is as to the $12,000. The only question

really in dispute between the parties as to this $12,000 is whether the plaintiff is entitled to have the house on Douglas Ave. declared to be her own. The defendant admits getting the $12,000 and depositing it in the Bank at Lawrence in her own name. The deposit, as I have said, was made on September 13, 1910. The plaintiff says that she told the defendant to deposit it in her (the plaintiff's) name. The defendant says that the plaintiff told her to deposit it in her own (the defendant's) name. But I think from the defendant's own examination the plaintiff's statement is correct.

Whichever is right there is no doubt the money was put in the defendant's name, and the defendant told the plaintiff when she returned from Boston that she had done so, and that does not appear to have made any breach of their friendship. After the money was so deposited, however, the defendant appears to have drawn some of it at all events without the plaintiff's knowledge or consent, and used it for her (the defendant's) own purposes. On February 16, 1911, she drew $25. On April 6, $25. On May 25, $4,000 (and to this item I will have again to refer). On June 26, $246.14; October 6, $50, and on October 16, $8,085.24, and these drawings constituted the whole amount of the money, including interest, that was in the bank up to October 16, 1911, which was $12,431.38. The $8,085.24 the defendant paid to the plaintiff some time after October 16, 1911, and at the same time gave her $100 as interest. On May 22, 1911, the defendant entered into an agreement with the late Dr. McInerney to purchase a property owned by him on Douglas Ave. in St. John, for $3,770, and it is this property that the plaintiff claims should be transferred to her. The defendant paid for the property out of the $4,000 drawn from the Bay State National Bank on May 25, 1911.

The plaintiff claims that she did not know the $4,000 was drawn out until June, 1911, when she says the defendant told her that she had purchased this property for her (the plaintiff) and paid for it with the plaintiff's own money. The defendant says that she purchased it for herself, and with the consent of the plaintiff used a portion of the $4,000 drawn on May 25 to pay for it.

Their different statements as to the purchase of this property

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are as follows:—The plaintiff says that in June, 1911, she saw in the press that the defendant had purchased this property, and she spoke to her about it. She says she spoke to the defendant in her rooms, which at that time were on Main St., in the city of Saint John, about the purchase of the property.

The defendant's statement is as follows:—She says that she made an agreement with Mr. McInerney in May, 1911, to purchase this property for $3,700. The contract for the purchase was put in writing, but it was not before the Court. The defendant was unable to produce it, but she fixes the date by a letter received from Mr. McInerney (a barrister with whom the agreement to purchase was made) dated June 19, 1911, in which he calls her attention to the fact that on May 22, 1911, she had made an agreement for the purchase of the house, which purchase was to be completed within one month from that date, and in the letter he asked the defendant for the amount of the purchase money, $3,700.

The defendant on May 25 drew from the Bay State National Bank $4,000, and on May 27 deposited the amount less $4 exchange, and $25 in cash, that is $3,971, with the Bank of Nova Scotia in St. John, and on June 21, 1911, drew from the bank the sum of $3,700, and paid for the property apparently on June 22, because on that day the purchase was completed. The deed from Dr. McInerney to the defendant is dated June 21, and appears to have been drawn by Mr. McInerney. The mortgage and bond to the plaintiff, which is for $4,000, was drawn on June 26, 1911, and appears to have been drawn by Mr. Stewart Fairweather. Whether at that time he was acting for the defendant or the plaintiff does not appear, and no evidence was given with regard to it. Mr. Fairweather himself had died before the trial of this cause. The mortgage and bond, however, were given by the defendant to the plaintiff, and the defendant kept the property insured, making the insurance payable to the plaintiff though the insurance papers were kept by the defendant. The plaintiff from time to time collected interest from the defendant down until November, 1913, but the defendant did not pay the full amount of interest as it came due, and in November, 1913, the plaintiff went to Mr. Stewart Fairweather, who as I have said drew the mortgage and bond, and he collected from the

defendant for her on account of interest $25. There was still a considerable amount of interest owing, and the plaintiff on January 23, 1914, consulted Mr. Quigley, and she shewed him the bond and mortgage. He directed her to have it immediately recorded, which she did. I should have said the amount of interest paid by the defendant prior to this was $200, and Mr. Quigley collected from the defendant $300, being the full amount of interest on the mortgage of $4,000 up to December, 1913.

It is alleged on behalf of the plaintiff that when she consulted Mr. Quigley she did not give him the full particulars as to the dealings between herself and the defendant. Subsequently on April 9 an action was commenced by the plaintiff against the defendant, and an injunction obtained to prevent the defendant from transferring the house, and asking that it be declared that the defendant held the house in trust for the plaintiff, and on March 30, 1914, the suit with reference to the $5,000 was commenced, and an injunction obtained against the Bank of Nova Scotia to prevent the transfer of moneys in that bank. The plaintiff claims that this house having been bought by the defendant with money belonging to the plaintiff is really her house, and she alleges that the defendant told her that when she purchased it she was purchasing it for the plaintiff. Against that statement we have in the first instance the statement of the defendant herself. It is true, however, that the defendant had committed a breach of trust with reference to this very money. She had certainly drawn some moneys out without the knowledge of the plaintiff, but taking the whole transaction with reference to the house, leaving out what the parties say, and just taking what was done, it must be admitted that the defendant's statement is the most consistent with what was in fact done. The defendant did give the plaintiff the mortgage on the house; the plaintiff accepted it and collected the interest for two years and a half. She first consulted a lawyer with reference to it in December, 1913, and he collected $25 on account of interest and paid it over to her. She then consulted Mr. Quigley in January, 1914, and he collected $200 (being the balance up to December of 1913) as interest, and paid it over, and it seems to me that whether the plaintiff's statement as to what really took place at the time the purchase was made by the defendant is correct, or whether

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the defendant's statement is correct, it is true that the plaintiff with the knowledge of the fact that the house was paid for with her money took a mortgage on it and collected the interest for two years and a half, and I cannot see my way to say that she did not know she had a mortgage. She was collecting interest on the mortgage, and she had consulted two lawyers, and through them collected interest, and I don't think it is a good answer to say that when she consulted these lawyers she did not fully inform either of them as to the relations between her and the defendant. Therefore I think I cannot order the house transferred to the plaintiff. She has the mortgage on it, and although the mortgage is for a little more than the purchase price, still it appears in evidence before me that the house is full security for the amount ($4,000). But the defendant must account to the plaintiff for the full amount of the $12,000 and interest, and this amount has not fully been paid.

I find as a fact that the $5,500 was given by the plaintiff to the defendant in July, 1910, for safe keeping for her (the plaintiff). I find as a fact that the defendant has not paid or accounted to the plaintiff for the full amount of the $12,000 she received from her.

The defendant in her answer filed a counterclaim, claiming commission and reasonable charges for work and services, and also that she was entitled to be allowed travelling and other expenses and exchange and discount on the money. I will disallow all her claim except that for travelling expenses in going to Lawrence to deposit the $12,000, and if she there paid from her own means any discount on the money so deposited she will also be allowed that. The balance of her claim will be disallowed.

The order therefore will be that the defendant account to the plaintiff for $5,500 given to her on July 3, 1910, with interest at 3 per cent. from the time she placed it in the American Trust Co. in Boston, until she drew it from that company, and at 5 per cent. on the amounts as she from time to time withdrew them from that company. That the defendant account to the plaintiff for the $12,083.24, that she deposited to her own credit in the Bay State National Bank, at 3 per cent. while it was in the bank, and at 5 per cent. on the amounts as she from time to time withdrew them from the bank. She will be given credit for the

$4,000 that is secured on mortgage at 5 per cent. on the property at Douglas Ave., and also for her travelling expenses in going to Lawrence to deposit the $12,000, and any discount she may actually have paid on the money. The injunction to restrain the defendant from transferring the house on Douglas Ave. must be dissolved. The counsel for the defendant claimed that in case the injunction was dissolved the defendant would be entitled to costs. I will give the defendant no costs. I refuse to give the defendant costs because in the whole transaction she appears to have acted in a fraudulent manner.

The injunction against the Bank of Nova Scotia is continued, and the Bank is ordered to pay to the plaintiff the amount of $1,996.61 now on deposit to the credit of the defendant, with the accrued interest.

The defendant must pay the costs of this suit, to be taxed from the time of the consolidation as one suit. Leave will be reserved for either party to make application for further directions.

*Judgment for plaintiff.*

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## JEFFRESS v. MacKINNON.



*Manitoba King's Bench, Metcalfe, J. April 30, 1915.*

1. EVIDENCE (§ VI C—525)—PAROL EVIDENCE—SALE OF GOODS—COLLATERAL AGREEMENT—ADMISSIBILITY.

A verbal agreement made concurrently with a sale of goods but not referred to in the written order, that the vendor's representative would, in consideration of the sale, assist the buyer in demonstrating and retailing the goods is a collateral agreement of which oral evidence is admissible where it does not contradict the writing and the buyer may set up a claim for damages for the breach of such collateral agreement by way of counterclaim to an action for the price.

Statement

ACTION for goods sold and delivered.

*C. P. Fullerton*, K.C., and *A. B. Bell*, for plaintiffs.

*R. W. Craig*, for defendant.

Metcalfe, J.

METCALFE, J.:—The defendant is a merchant residing at Winnipeg selling generally to the trade in Winnipeg and the west. The plaintiffs are manufacturing chemists who manufacture at Walkerville certain liquids and solids used in preparing foods and drinks. The plaintiff Jeffress is the travelling salesman of the plaintiff partnership. It is obvious that the goods he

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sells require special introduction and salesmanship. In January, 1914, Jeffress, being in Winnipeg, he and MacKinnon, with a view to MacKinnon's handling the plaintiffs' line of goods for Winnipeg and the west, visited many of MacKinnon's customers. Jeffress demonstrated and talked his goods so successfully to these customers that MacKinnon became enthusiastic and thought that he could carry the line, especially with the assistance of Jeffress, to the mutual benefit of both. Then commenced the dealings which led to this lawsuit. The defendant then, and at different times, bought from the plaintiff various articles, including cider essences, chocolate paste, powders, flavouring extracts, grape-vino and Caro.

Cider essences were to be used diluted with water to make non-intoxicating drinks. More essence was required to a given quantity of water than as represented by Jeffress, and the defendant is entitled to damages.

The powders included pastry puff, pie powder and lemon pie powder and eggine. Pastry puff is used to make an artificial whipped cream. Jeffress told MacKinnon that if it were beaten with water it would make a good imitation whipped cream and when mixed with one-half real whipped cream it could not be distinguished from the real article, and would keep in the same condition longer than the real article. Pie powder was represented by Jeffress to be useful to make cream whip better when the real cream was light. Lemon pie powder is used to make an artificial lemon pie. Jeffress represented it would make lemon pies much cheaper and just as good as the real lemons. Eggine is a powder supposed to take the place of real eggs. Jeffress represented it was made from eggs and was cheaper and just as good. I find that none of these powders were as represented. The Eggine especially was a disappointment. The plaintiff took all the Eggine back so there is now no dispute over that except for some small quantities still in the hands of unsatisfied customers. I will allow damages on this item.

Grape-Vino is a non-intoxicating drink. It was sold by sample. I am unable to find as a fact that the goods delivered were inferior to sample. The defendant claims that the plaintiff was to mail coupons to prospective customers. This the plain-

tiff admits, but he says that the defendant was to send a Winnipeg city directory to Walkerville so that the coupons could be mailed from there. The directory, however, was very late in arriving at Walkerville, reaching there about the time of Jeffress' visit to Winnipeg in June. When Jeffress came he brought some coupons. It is quite probable that he did not bring as many as it was intended should be mailed from Walkerville. I have no doubt that the non-issue of these coupons as originally intended seriously affected the sale of Grape-Vino. However, it was the duty of the defendant to supply the directory. Instead of expressing it or mailing it forward he packed it with some goods which were returned by freight to Walkerville, thus causing undue delay. I think his carelessness in this regard and his subsequent arrangement with Jeffress as to the sending out of coupons here preclude him from claiming for damages for a breach of the agreement to send out coupons.

Before Jeffress returned to Winnipeg in June various customers complained to MacKinnon as to the quality of some of the goods. MacKinnon's letters to Jeffress were, to say the least, not enthusiastic. When Jeffress arrived in June there were serious complaints that some of the stuff was not as represented. Jeffress and MacKinnon visited all the disappointed ones and many others. Jeffress again demonstrated and talked. If it were possible he was more than ever friendly with MacKinnon. As a salesman he was to the manor born. He made friends with everybody. Under his hypnotic influence MacKinnon became again enthusiastic and ordered more goods. It was on this June trip that the order for Caro was given. Jeffress had a sample. MacKinnon says that Jeffress represented that it was a drink that would take the place of Bovril; that it was equal to, and had as much nutriment as Bovril. The goods were new and had to be "introduced." Jeffress and Mackinnon visited several of the larger stores, but it was conceded that Caro could not be sold to the trade in any great quantity until the fall season.

Jeffress wanted MacKinnon to give a large order. He told MacKinnon that if he would order 200 cases he would return in the fall and help him sell whatever he had left. I have no doubt that was a material inducing cause. MacKinnon, knowing noth-

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ing about Caro excepting what he saw from the sample and from what Jeffress told him, might well hesitate to give such a large initial order of a new article of that nature, but with the assistance of Jeffress, the manufacturer and a past master at the art of selling such goods, he might well have hoped to dispose of the greater part, if not all, of the shipment. There was a written order as follows:—

E. W. Jeffress & Co.,
Walkerville, Ont.

Sold to Ceylon Tea Company, at Winnipeg, Man.
Terms: 1/3—30, 1/3—60, 1/3—90 days from arrival.
Ship: 1st Sept. 1914.
200 cases Caro at $25 per case. Less 20—10—10 and freight charges. Advertising matter, etc., gratis.

H. L. M.

The initials "H.L.M." are in the handwriting of the defendant.

On June 29, 1914, MacKinnon wrote a letter to the plaintiff Perry (a partner of Jeffress), at Walkerville, saying, in regard to Caro: "Are you able to supply any Caro? I sold two cases to-day and can sell same right along. I think we shall do a big business in Caro."

On August 17 the plaintiffs wrote defendant a letter in which they state: "We also wish to advise you that we are sending you under separate cover samples of Caro."

On September 21, 1914, the defendant having received an invoice of the Caro wired to the plaintiffs, and followed the wire with a letter as follows:—

We wired you this morning as follows: "Do not ship Caro; if shipped, recall at nearest junctional point. Absolutely cannot accept. Writing."

We were very much surprised to receive your invoice for these goods as they were not to be shipped for some time yet; and then we only wanted a small quantity shipped at a time. We believe that it may be possible for us to sell this quantity, but we do not want to repeat the mistake we have made this summer in buying so heavy an article which is unknown, and whose merit has to be proven. We are to-day in a most unsatisfactory relationship with our customers over Grape-Vino. Some who have purchased any quantity at all are trying to get me to return what they have on hand, and we have already in stock over $1,000 worth which cannot be sold. If we refuse to take back the goods, we lose our customers, and if we take them back we are piling up goods which we cannot move until next year and then very slowly.

We are enthusiastic about Caro and are ready to give it a good run, but

absolutely will not accept an order of this magnitude; twenty-five cases would be a very large order to put in of these goods to commence with, and this is the limit.

Therefore, as per my telegram you must recall this shipment, otherwise it will be on hand here at your own risk, as we will not accept this quantity.

On October 2, the defendant wrote the plaintiff as follows:—

We were very sorry to have to refuse your shipment, as we had hoped that you would have recalled shipment if shipped, or not shipped at all if you had not shipped when you received our wire.

There are no mugs in the cases, and it will be absolutely impossible to sell them without the mugs. I am quite willing to do my best to sell Caro, but, absolutely cannot put ourselves in the same relationship with our customers over Caro as we have over Grape-Vino.

Awaiting your reply, I am, etc.

On October 5 the plaintiffs wrote the defendant as follows:—

In reply to yours of the 2nd inst., beg to say that we are surprised at the attitude you have taken in regard to your order for Caro.

We did not recall this shipment upon receipt of your wire as we had no intention of doing so. We did not answer your letter of September 21 as we thought it best to consult before doing so. Now, in answer to yours of above-mentioned date, beg to say that every case of Caro contains six cups and advertising; absolutely every case included in the 200 cases of Caro shipped you.

This order for 200 cases of Caro was given to our Mr. Jeffress on June 20, and had you wished to make any changes in your order you had several months to do it in. Now, we have a signed order from your Mr. MacKinnon for this shipment, and as we have put our time, money and effort into same we will expect you to live up to the terms of your order.

We infer from the date of your letter that Caro arrived October 2, and as per terms of this order you were to have 30 days from arrival to pay 1/3 and 60 days 1/3 and 90 days 1/3; we are sending you enclosed invoice as described. Will you also kindly notify us the amount of freight so that we may pass you through a credit for same, as freight was to be allowed.

Thanking you in advance for your prompt attention to the above, we are, etc.

On October 13 the defendant wrote a letter to the plaintiff in which he says:—

I am in receipt of your letter of October 9, and am indeed surprised at the attitude that you have taken, both in regard to the account, and also in regard to the shipment of Caro. . . . Now, in regard to Caro, if you could have been with me and had all the trouble that I have had with the different lines which Mr. Jeffress and I sold, you would quite understand my attitude in regard to taking into stock so large a quantity of goods, the merit of which must yet be proven. My intention was to have 25 c/s come at a time, and told Mr. Jeffress that I expected we would be able to sell 200 cases, but had no thought of having 200 cases come at one time.

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I did not expect shipment of any of it for some time yet, otherwise I would have written you before, and I certainly had no thought that you would send 200 cases without further instructions. I would suggest that you put these 200 cases in a heated warehouse, which will be a very inexpensive rate of storage, until Mr. Jeffress can come, and I assure you that we will do everything in our power to assist him in placing it.

Believing that you will benefit, in the long run, by settling our dispute in a fair way, we remain,—Yours sincerely, H. L. MACKINNON, *Manager.*

Mr. Perry,—If you desire it put in storage, let me know by return sending an order on the Ry. Co., and the bill of lading instructing the Ry. Co. to deliver to yourselves, and I will put it in the cheapest storage in town and pay the freight for you, and this amount can be deducted from our account. This will save you the inconvenience of forwarding the money.

Your dft. has come this A.M. and I cannot pay it. I am sorry.

On October 24 the plaintiffs wrote the defendant as follows:—

We are in receipt of your favour of the 13th inst., and beg to advise that we have stated our views of the matter of Caro shipment in our previous correspondence and as we have your signed order for 200 cases to be shipped in Sept., we will accept no other settlement than is stated in the above-mentioned order.

On October 26 the defendant wrote the plaintiffs a letter in which he states:—

Will Mr. Jeffress be coming soon? If not, will you please take up the matter about Caro with him and see if he is not willing to have these goods placed in storage here, to be taken up 25 cases at a time as we need it. Otherwise the matter would almost warrant his coming up, as I am sure it is possible to make some arrangements to the satisfaction of both parties, and not break the business relationship.

On November 4 the defendant having taken some legal advice, wrote a long letter to the plaintiffs in which he sets forth many complaints. Regarding Caro he says:—

In consideration of the above matter and after taking into consideration and consultation, we have decided that in fairness to all the parties you should place the present consignment of Caro on a consignment basis in return for which we will endeavour, with the assistance of your Mr. Jeffress when he comes west, to place this product with our customers, though, as we said before, we consider this almost a risk. . . . If we cannot arrange it on some basis of this kind, we will have to rely on the representations of your Mr. Jeffress, hold the Caro here to your order and return to you the cider essences and Grape-Vino in stock.

On the following day, November 5, the Canadian Pacific R. Co. having notified the defendant that Caro was still in their possession at the owner's risk, the defendant made arrangements with the railway company to take the stuff over. MacKinnon

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says the Caro was then likely to freeze at any moment and that he paid the freight and took delivery solely to save loss, and under protest.

The defendant does not appear to have complained as to the quality of the Caro until after action brought. Even in his statement of defence he makes no specific allegation of misrepresentation as to quality, simply saying in a general way and with regard to all the goods that they were sold by samples or descriptions or both, and that none of the goods corresponded with the descriptions or samples. Even if the evidence were admissible as to the misrepresentations as to quality, I do not think the defendant has established a breach thereof. It is true that Professor Parker has stated that from a certain analysis he would say that it does not contain as much nutriment as Bovril. He admitted he did not take all things into consideration. Bovril is a beef compound and Caro is a vegetable compound. This difference was known to the defendant when he bought. The defendant had no right to repudiate the contract for Caro on the grounds disclosed prior to the action. Apparently he made no test as to quality until the trial. Under all the circumstances I do not think he can now repudiate. He has not shewn what is the damage if the representations as to quality were untrue. I cannot even estimate its probable effect on sales.

Jeffress denies that he agreed to return in the fall and act as salesman of the Caro. He says that, in any event, the contract is in writing and that no evidence of verbal agreements should be allowed. I am unable to agree. The alleged agreement does not contradict the writing, but is an agreement collateral thereto. The circumstances were such that I believe the defendant when he says that Jeffress' promise to return was an inducing factor. Jeffress was not only the manufacturer of these goods but he knew how to demonstrate. He is a salesman of great capacity and resource. I accept the defendant's story on this point and think that he should receive compensation for the breach.

I do not allow damages for loss of business and trade and profits, nor for the claim respecting the hiring of Caton; nor for the claims for damages *re* chocolate paste and flavouring extracts.

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In the second paragraph of his counterclaim the defendant asks for $322.34. I allow him in respect of this claim $280.

I allow the defendant on his counterclaim, as follows:—

On paragraph 2 of counterclaim, $280; for cider essences, $300; for powders, $500; Jeffress' breach of agreement to return and sell Caro, $1,000; making a total of $2,080.

There will be judgment for the plaintiffs for the amount claimed with costs, and judgment for the defendant for $2,080 and costs.

*Judgment accordingly.*

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N. S.

S. C.

## Re CITY OF HALIFAX AND KANE.

*Nova Scotia Supreme Court, Graham, E.J., Russell and Ritchie, JJ. April 5, 1915.*

1. TAXES (§ IV—175)—LIEN FOR—LIQUIDATION OF COMPANY—ABROGATION—DOMINION WINDING-UP ACT—PRIORITY NOT EXTENDING TO PRIOR YEARS.

A preferential lien for taxes which the City of Halifax has upon personal property during the civic year for which the taxes are imposed under secs. 449 and 450 of the Halifax charter is not abrogated by the liquidation of the company liable for such taxes under a winding-up order made under the Dominion Winding-up Act; but such priority does not extend to the taxes for prior years as to which no effectual levy had been made.

Statement

APPLICATION by the City of Halifax to have taxes allowed as a lien or charge on the assets in the hands of the liquidator.

*J. B. Kenney*, for liquidator.

*F. H. Bell*, K.C., for city.

The judgment of the Court was delivered by

Graham, E.J.

GRAHAM, E.J.:—The above company is in liquidation under the Dominion Winding Up Act, and the City of Halifax is asking to be paid in full for 3 years' taxes, all due before the petition was presented. The learned Judge has decided that for the year May, 1913, to May, 1914, the city is entitled to be paid in full in consequence of its statutory lien for the taxes. But in respect to the two previous years, when it is admitted there is no lien he has decided that the city has no claim to be paid in full.

The parties have respectively appealed from the parts of the judgment adversely to their interests.

In my opinion the learned Judge was entirely right. First, in respect to the third year's taxes.

Secs. 449 and 450 of the City Charter are very clear. Secs. 449 and 450 are as follows:—

The personal property of every person or company shall be liable for the full amount due by such . . . company to the city for rates and taxes, and such rates and taxes shall constitute a lien on such personal property during the civic year for which they are rated or imposed in preference and priority to and notwithstanding any assignment, mortgage, conveyance of, or claim or lien for rent, or other claim or lien upon such personal property, or any judgment entered against such person or any execution, warrant, attachment, or other process issued or levied to bind such property.

450 (1) No personal property of any person or corporation shall be taken possession of or removed by virtue of any assignment, mortgage or other conveyance, or claim or lien for rent, or other claim or lien, or any execution, warrant, attachment or other process, unless the holder of such conveyance, claim or lien, or the person suing out such process, before taking possession of or removing such personal property, pays all the rates and taxes for the then current year due by such person or corporation.

Sub-secs. (2) and (3) of the section require every sheriff or officer executing process, or person distraining for rent, to first pay over to the collector the rates and taxes in preference to his own process.

And every holder of a conveyance, claim or lien taking possession of or removing such personal property shall be liable to an action for the amount due to the city for rates and taxes if he does not pay such amount within two days, and notwithstanding such taking or removal the property may be distrained upon by the collector.

The Winding Up Act contemplates privileged claims or liens, but in no place is this claim or lien for taxes destroyed or restricted. Under sec. 33 it is provided that the liquidator upon his appointment shall take into his custody or under his control all the property effects and choses in action to which the company is or appears to be entitled and he shall perform such duties in reference to winding up the business of the company as are imposed by the Court or this Act.

Sec. 13 provides that

all remedies sought or demanded for enforcing any claim for a debt, privilege, mortgage, lien or right of property upon, in, or to any effects or property in the hands, possession or custody of a liquidator may be obtained

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by an order of the Court on summary petition and not by any action, suit, attachment, seizure or other proceeding of any kind whatsoever.

I cannot imagine any more complete definition in this legislation of the province and Dominion to preserve and enforce the lien of the city for taxes.

And that is all the city is asking for in this proceeding and in this Court against its own officer.

Coming to the rates and taxes for the two previous years, it will be observed that the lien for rates and taxes is only constituted "during the civic year for which they are rated or imposed." And, therefore, there is no lien in respect to the rates and taxes of the two previous years. That is admitted. But the city collector says that in August, 1913, he sent his subcollector to make a levy on the stock of the company in their premises on Barrington street. A Mr. Naismith came to the collector's office with a Mr. F. H. Keating, representative in Halifax for a firm in Montreal, the principal creditor, who said that that firm had taken over the business and would either wind it up or carry it on, they were not sure which, but that they wished further time to sell off some of the stock, but that in any case the taxes would be paid, and in consequence of this representation he withdrew the levy. I think he does not state that any levy was really made or definite goods levied on.

The winding up petition was presented November 27, 1913.

Now, whatever remedy the city may grant against others (I say nothing about that), I think that when it abandoned its levy and the winding up intervened, and the general creditors' rights accrued, it had no claim or right to priority over other creditors. The company could not, as against the general creditors, by any arrangement or agreement made by itself or any creditor in its behalf, agree with the city to substitute something else for the right its warrant for taxes and levy would have given it, and thus postpone and keep good its priority which it abandoned or never secured. It is contended that the general creditors got the benefit of the abandonment of the levy. I imagine they frequently get the benefit of failures to levy or to register liens. Sometimes, however, it injures creditors when an earlier available seizure is not enforced. But a promise to make good any

loss caused by such an abandonment does not help out a statutory condition or provision rendering certain steps necessary to create or constitute a priority among creditors otherwise equal. In my opinion the city has no priority in the case of the taxes of the years preceding the last.

The appeals will be respectively dismissed and the costs will in each case follow the result.

*Appeal dismissed with costs.*

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## BLACK v. DOMINION FIREPROOFING CO.



*Manitoba Court of Appeal, Howell, C.J.M., Richards, Cameron, and Haggart, JJ.A. May 17, 1915.*

1. JUDGMENT (§ II E 1—152)—ACTION FOR DEATH OF SERVANT—CONCLUSIVENESS AS TO PARTIES—EMPLOYER AND CONTRACTOR.

Where an action for negligently causing death is brought by the representative of the deceased workman against the employer in respect of negligence in operating a hoist in building operations as to which the employer and a sub-contractor would each have a measure of responsibility, the taking of judgment and receiving satisfaction in the action against the employer is a bar to a second action against the sub-contractor in respect of his alleged negligence; and after receiving satisfaction of the judgment so recovered against the one, the plaintiff is estopped in the second action from saying that the injury resulted from the negligence of the sub-contractor only and that the principal contractor who had consented to judgment in the first action was not in fact liable.

[*Brown* v. *Cambridge*, 85 Mass. 476; *Kemball* v. *Hamilton*, 4 App. Cas. 504, applied; *Atlantic Dock Co.* v. *New York*, 43 N.Y. 64; *Donovan* v *Laing*, [1893] 1 Q.B. 629, distinguished.]

2. ELECTION OF REMEDIES (§ II—10)—CHOICE—EFFECT.

When a plaintiff has separate, concurrent or successive rights of action on the same transaction, or for the same injury, he can have only one full satisfaction; this obtained, his further actions or remedies will be barred.

[23 Cyc. 1193, referred to.]

Statement

APPEAL from the judgment of the trial Judge in a negligence action.

*W. P. Fillmore*, and *A. Farquhar*, for appellant.

*T. J. Murray*, for respondents.

Howell, C.J.M.

HOWELL, C.J.M.:—While the deceased was standing on a plank a hoist struck it throwing him off and he was fatally injured. The hoist was owned by Carter-Halls-Aldinger Co. and

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was driven by their engine in the control of and operated by their engineer. The engineer acted on signals sounded by an electric bell, a part of the hoisting machinery owned by them. One Elliott was at the time of the accident giving the signals by this bell, whereby the engineer raised or lowered or stopped the "skip" or carriage of the hoist.

The work then being done was hoisting certain material of the defendants who were sub-contractors of Carter-Halls-Aldinger Co., working in a building then in the control of the latter, and who let the defendants from time to time use this hoist which was ordinarily used by Carter-Halls-Aldinger Co. for their work.

The deceased was an employee of Carter-Halls-Aldinger Co. and was at the time of the accident working at the open shaft where the hoist was being operated, changing and adjusting the electric wires which operated the electric bell.

The evidence in this case shews that Elliott, who was giving the signals at the time of the accident, was an employee of the defendants, and the plaintiff claims that his negligence in giving the signals caused the accident. The only evidence as to the accident is given by Elliott, a witness called by the plaintiff, and his evidence is in no way contradicted. He says he properly gave a signal by two bells, and seeing the skip going the wrong way, he properly gave at once a signal of one bell, which is to stop, but it did not stop and this caused the accident. If this is true then the negligence is that of the engineer in not acting promptly and properly to the signals. The plaintiff's counsel also urges that the code of signals was imperfect and confusing, but whether this code was one which the engineer usually acted on and to which Elliott was obliged to conform, or whether it was one arranged between Elliott and the engineer does not appear from the evidence. There was evidence also from which it might be inferred that the bell or wiring was defective, and for this reason the engineer did not get the signal.

This may be a case where the defendants were operating a defective and dangerous machine supplied and known to be dangerous by Carter-Halls-Aldinger Co., or perhaps the latter, through their engineer, operated it with defective or careless

rules as to signals and the defendants joined them in so operating the same or perhaps Elliott and the engineer negligently and carelessly agreed upon a code of signals which was uncertain and vague. If either of the supposed state of facts existed and caused the accident, then it would be open to grave doubt whether Carter-Halls-Aldinger Co. and also the defendants were not both and each legally liable to the plaintiff, as in *Kirk* v. *Toronto*, 8 O.L.R. 730.

The plaintiff commenced an action in the Court of King's Bench here against Carter-Halls-Aldinger Co. to recover for her loss occasioned by this accidental death, and the allegations in the statement of claim in that case are practically the same as in this case. In that case Elliott was alleged to be an employee of Carter-Halls-Aldinger Co., and it was alleged that he was negligent as in this case, causing the accident. It was in that case, as in this, alleged in the alternative that the signal apparatus of the hoist was not in working order and therefore the accident. In that case also as in this it was alleged by way of further alternative that the defendants were negligent in not providing and maintaining a proper and efficient system of signalling, which I assume was the arrangement as to bells to be given to indicate the movements required of the skip above referred to.

In the case against Carter-Halls-Aldinger Co. the defendants therein filed a statement of defence and fully denied their liability and the whole onus of proving the case was thrown on the plaintiff, but after the case was at issue and before trial the parties agreed to a judgment and a judgment was duly entered in that cause upon the issues therein raised in favour of the plaintiff for $2,250, and thereafter the defendants in that suit paid into Court to the credit of that cause the sum of $2,250 in satisfaction of that judgment and the plaintiff duly took this money out of Court.

The plaintiff therefore sued for and recovered judgment on the identical cause of action sued on in this case and has received satisfaction.

In the replication in this case the plaintiff admits of record that she did get this judgment against Carter-Halls-Aldinger Co., but she alleges she had no cause of action against them. The

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plaintiff did allege that the defendants in the first suit were liable for the wrongs complained of in this suit; she converted the claim for these wrongs into a judgment and received satisfaction of the judgment. She now claims another judgment for the same cause of action.

In *Kendall* v. *Hamilton*, 4 A.C. 504, Lord Cairns says:—

> Further than this, if actions could be brought and judgments recovered, first against the agent and afterwards against the principal, you would have two judgments in existence for the same debt or cause of action,

a state of affairs which he thought should not be.

From the acts of the plaintiff I shall assume that she had originally a cause of action against Carter-Halls-Aldinger Co., and also against the defendants for the death of her husband, one cause of action against both or either. If this is not the case then the first action was brought in bad faith and the money was dishonestly received. To borrow and adopt the language used in *Brown* v. *Cambridge*, 85 Mass (U.S.), at 476,

> The plaintiff is estopped to say that she had no claim against Carter-Halls-Aldinger Co. for the tort, but compelled them to buy their peace by settlement of a claim that was groundless and therefore malicious, for this would be an allegation of her own wrongful act.

The facts in this case as above reviewed shew that perhaps the defendants in both suits might be liable for the same cause of action, and I think the plaintiff is bound in common honesty to so admit and it seems to me the law of estoppel could in this case on the above facts be invoked by the defendants.

In this aspect of the case the defendants in both and each suit were liable, and the plaintiff having sued and recovered judgment against one, cannot institute a fresh suit and recover against the other.

The appeal is dismissed with costs.

Cameron, J.A.

CAMERON, J.A.:—This action is brought by the plaintiff as administratrix of the estate of John Percival Black, deceased. The defendants were sub-contractors under the Carter-Halls-Aldinger Co. Ltd., which had a contract for the erection of the Great West Permanent Loan building in Winnipeg. It is alleged in the statement of claim that the defendants were, on April

26, 1913, operating and had control of a hoist in said building, using it to lift their material from the ground to the storey of the building where they were working. The hoist was the property of the Carter-Halls-Aldinger Co. The deceased was employed by the last-named company, and on the day named was engaged on the fifth floor of said building in changing, repairing or removing the signal wires used in connection with the hoist, and while he was so engaged and standing on a plank, projecting from the fifth floor, into the shaft of the hoist, the plank was struck by the platform of the hoist and the said John Percival Black was thrown into the light well of the building, and sustained injuries which caused his death. It is further alleged that the platform struck the plank by reason of its being lowered at the signal of one Arthur S. Elliott, who was in charge of the hoist, and who was at the time in the service of the defendants and had control of the hoist intrusted to him by the defendants. It is further alleged that the signal was negligently given by the said Elliott, and, alternatively, that the signal apparatus was not in working order, that a proper system of signalling was not provided and that Elliott knew that the said John Percival Black was engaged in changing and repairing the signal wires. The statement of defence makes general and specific denials of the allegations in the statement of claim, alleges knowledge by the deceased of the defects (if any) in the signalling apparatus, that the system of signalling was the best obtainable, and that the deceased was guilty of contributory negligence. It is also asserted that the plaintiff brought an action on May 23, 1913, against the Carter-Halls-Aldinger Co. for damages arising out of the said accident and recovered therein a judgment for $2,238, which was duly entered and was, prior to the commencement of this action, satisfied by payment. The defendants say that the plaintiff is now concluded by the said judgment and that the cause of action herein is no longer available.

In her reply the plaintiff admits the recovery of the judgment aforesaid, but says it was entered by consent and denies that the Carter-Halls-Aldinger Co. was under any liability or that the plaintiff had any cause of action against the said company and alleges that the cause of action herein was not the same as the cause of action against said company.

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At the trial before Hon. Mr. Justice Galt and a jury there were put in evidence an exemplification of the judgment recovered against the Carter-Halls-Aldinger Co. and the pleadings in the action. The allegations made in the statement of claim in that action are similar to those in the statement of claim in this, paragraphs 9, 10, 11, 12, 13, 14 and 15 of the latter being practically repetitions of allegations in paragraphs 6, 7, 8, 9, 10, 11 and 16 of the former. In paragraph 8 of the former (the action against Carter-Halls-Aldinger Co.) it is alleged that Elliott was at the time of giving the signal in the service of the defendant. In paragraph 10 of the former it is also alleged that the signalling apparatus used in connection with the said hoist was, owing to the negligence of Carter-Halls-Aldinger Co., not in working order. The judgment roll shews that the action in the former case came before the Court on motion for judgment on November 4, 1913, and that the Court after hearing counsel, and defendant's counsel consenting, ordered judgment for the plaintiff for $2,238, which was entered accordingly. It appears that the amount of the judgment was paid into Court and in part taken out by the plaintiff.

At the conclusion of the case the learned trial Judge withdrew it from the jury and directed a verdict entered for the defendants on the ground that the plaintiff having recovered a judgment against Carter-Halls-Aldinger Co., the defendant company was released thereby from any liability. From this judgment the plaintiff appeals.

We were referred by plaintiff's counsel to *Atlantic Dock Co. v. City of New York*, 43 N.Y. 64. In that case damage had been done to the property of the plaintiff which had brought separate actions against the City of Brooklyn and the City of New York upon the same state of facts. Judgment was recovered against Brooklyn, which paid it and took an assignment of the claim against New York. The assignees then proceeded to prosecute the action against the City of New York, which set up the judgment. It was conceded that the City of New York was liable to the plaintiff, but it was contended that the cause of action was merged in the judgment against Brooklyn. It was held by the

Court that a good cause of action against the City of New York upon its conceded liability could not be taken away by a wrong done to another not in any way connected with it in the transaction. It would almost appear to me that the Court considered that a fraud had been perpetrated on the City of Brooklyn and that the City of New York could not take advantage of that fraud.

In this case, however, there is no admission of liability on the part of the defendant, and no denial of the liability of Carter-Halls-Aldinger Co. On the contrary, the defendant denies its liability and says that the whole question of liability has been disposed of by the action against Carter-Halls-Aldinger Co., in which judgment has been entered for the plaintiff, which extinguishes the plaintiff's right of action.

It is to be noted, also, that the actions against the City of Brooklyn and against the City of New York were commenced at the same time. That against Brooklyn first came to trial and was reduced to judgment. After the judgment was entered the City of Brooklyn, having paid the judgment, took an assignment of the claim against New York and proceeded with the action as already stated, whereupon the City of New York filed a supplemental pleading setting up the judgment and payment, and claiming the judgment as a bar. In this way a defence was raised by New York that was not available to the original cause of action, while in the case before us the action was brought after the former case had terminated in judgment.

The question arises whether the cause of action so reduced to judgment in the action against Carter-Halls-Aldinger Co. has ceased to exist and become unavailable to the plaintiff in this action.

Damages resulting from one and the same cause of action must be assessed and recovered once for all: Pollock on Torts, p. 193.

When a plaintiff has separate, concurrent or successive rights of action on the same transaction or for the same injury he can have only one full satisfaction; this obtained, his further actions or remedies will be barred: Cyc. XXIII. 1193.

The damages that result from one and the same cause of action must be assessed and recovered once and for all; and the plaintiff must sue in one action for all his loss, past, present and future, certain and contingent: Halsbury, X., p. 309.

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So in actions in which the damages are uncertain, a recovery and execution against another for the same cause, is a bar to another action for the same cause; as in trespass done by several, a recovery and execution against one, is a bar to an action for the same trespass.

Com. Dig. Action (K. 4) vol. 1, p. 326.

In *Brown* v. *Wooton*, Cro. Jac. 73, it was held that judgment recovered in trover may be pleaded in bar to a second action against a different person for the same cause,

for the cause of action being against divers, for which damages uncertain are recoverable and the plaintiff having judgment against one person for damages certain, that which was uncertain before is reduced *in rem judicatam*, and to certainty, which takes away the action against the others: p. 74.

In *King* v. *Hoare*, 13 M. & W., p. 494, it was held that a judgment against one of two joint debtors is a bar to an action against the other, and that it is pleadable in bar on the merits and not merely in abatement. In that case Baron Parke says (p. 502):—

If there be a breach of contract or wrong done or any other cause of action by one against another, and judgment be recovered in a Court of record, the judgment is a bar to the original cause of action, because it is thereby reduced to a certainty, and the object of the suit attained so far as it can be at that stage; and it would be useless and vexatious to subject the defendant to another suit for the purpose of attaining the same result. Hence the maxim "*transit in rem judicatam*," the cause of action is changed into a matter of record, and the inferior remedy is merged in the higher. This appears to be equally true where there is but one cause of action, whether it be against a single person or many. The judgment of the Court changes the nature of that cause of action and prevents it being the subject of another suit, and the cause of action being single, cannot afterwards be divided into two.

He then proceeds to discuss *Brown* v. *Wooton*, and holds that the true ground of the decision was not that the damages were unliquidated. He refers to the judgment of Chief Justice Popham, at p. 74, where it is said:—

If one hath judgment to recover in trespass against one, and damages are certain (that is converted into certainty by the judgment) although he be not satisfied, yet he shall not have a new action for this trespass. By the same reason, *a contra*, if one hath cause of action against two, and obtain judgment against one, he shall not have remedy against the other; and the difference between this case and the case of debt and obligation against two is, because everyone of them is chargeable, and liable to the entire debt; and therefore a recovery against one is no bar against the other, until satisfaction.

Baron Parke points out that this last reference is clearly to joint and several obligations.

It is true that Baron Parke had before him the case of a joint liability, but his exposition of the law goes further, it seems to me. In conclusion, he thus significantly states the judgment of the Court,

> that where judgment has been obtained for a debt as well as a tort, the right given by the record merges the inferior remedy by action for the same debts or torts against another party,

which expression of opinion is wide enough to include actions for tort by a plaintiff against defendants who are not necessarily joint tort feasors, but are liable for the same cause of action. Whether they be joint or several, the tort being the same, the inferior remedy by action has become merged in the right given by the record of the judgment already entered, and has, therefore, ceased to exist.

The above English authorities were questioned on the argument in *Brinsmead* v. *Harrison*, L.R. 7 C.P. 547, but followed. Blackburn, J., at p. 534, says *Brown* v. *Wooton* has been acted on for centuries.

In *Brown* v. *Cambridge*, 85 Mass. 476, an action had been brought by the plaintiff against the Cambridge Water Works for personal injuries. That suit was settled and the settlement was paid and a receipt in full given. The plaintiff then sued the City of Cambridge for the same cause of action. The Court held the satisfaction in the first action a bar to the second. I quote from the judgment at p. 476:—

> The defendants contend that the legal effect of this transaction (*i.e.*, the settlement and payment) is to discharge them also, and we are of opinion that it has that effect. It is an ancient doctrine that a release to one joint trespasser, or a satisfaction from him, discharges the whole: *Cooke* v. *Jennor*, Hob. 66 Co. Litt. 232. The same doctrine applies to all joint torts, and to torts for which the injured party has an election to sue one or more parties severally. Where, for example, a master is liable for the tort of his servant, a satisfaction from one discharges both, though they cannot be sued jointly. If it were not so, a party having a claim against several persons on account of a single tort might sue one and settle the suit, receiving damages; he might then sue another and settle in the same way, and repeat the proceedings as to all but one, and then sue him and recover the whole damage, as if nothing had been paid by the others. A door would thus be opened to a class of speculations that do not deserve

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encouragement. The rule of law which makes one satisfaction or release a bar to further claims for the same tort is founded in good reason.

In my opinion the plaintiff is estopped from saying that she has no claim against Carter-Halls-Aldinger Co., but that she forced that company, from some undisclosed reason ,to make a settlement of a claim that was groundless, for this would be an allegation of her own wrongful act. She is to be regarded as having prosecuted her claim against Carter-Halls-Aldinger Co. in good faith and that company admitted its validity so far as to consent to judgment against it.

It is not easy to conceive a plaintiff having a right of action for the same cause of action against two several and separate defendants, except when the relationship between the two is that of master and servant or principal and agent. Nevertheless, when we take the allegations in the action against Carter-Halls-Aldinger Co. as true, as we must so far as the plaintiff is concerned, and read them in connection with the allegations made and evidence given in the case at bar, there is presented for consideration that very case, viz., that of two rights of action for the same cause of action against two several and separate defendants. Judgment has been recovered in the first action brought, and the cause of action has become wholly merged in that judgment. It has, therefore, become extinguished and can no longer be made available as the basis of another action.

There is some reason to hold on the evidence in this case, that the judgment against Carter-Halls-Aldinger Co. was properly taken. Certain of the allegations in the statement of claim in that action appear to be supported by the evidence given in this, as is pointed out in the judgments of the other members of this Court.

I agree with the Chief Justice and would dismiss the appeal.

Haggart, J.A.

HAGGART, J.A.:—The trial Judge held that the recovery of judgment against the contractors, Carter-Halls-Aldinger Co. for the same cause of action was an answer to the plaintiff's claim against these defendants, withdrew the case from the jury and gave judgment in favour of the defendants.

The plaintiff appeals and contends that the trial Judge erred in so holding; that the contractors Carter-Halls-Aldinger Co.

and the defendants, the sub-contractors, were not jointly liable for the injury; that Carter-Halls-Aldinger Co. were not liable at all, and that the recovery of the former judgment was not a bar to this action.

The plaintiff contends that a judgment *inter parties* raises an estoppel only against the parties to the proceeding in which it is given and their privies, and that as against all other persons they are *res inter alios acta* and it is not admissible evidence of the facts established by it, and in support of this proposition, they cited 13 Hals. 343, and *Anderson* v. *Collinson*, [1901] 2 K.B. 107; *Christy* v. *Tankard*, 9 M. & W. 438; *Spencer* v. *Williams*, L.R. 2 P. 230, and *Jenkyn* v. *Jenkyn*, 5 W.R. 43, are authorities to the same effect.

*Donovan* v. *Laing*, [1893] 1 Q.B. 629, was relied upon by the plaintiff. There the defendants contracted to lend to a firm who were engaged in loading a ship at their wharf a crane with a man in charge of it. The man in charge of the crane received directions from the firm or their servants as to the working of the crane and the defendants had no control in the matter. The plaintiff, who was a servant of the wharfingers and was employed by them to direct the working of the crane, sustained an injury through being struck by it, by reason of the negligence of the man in charge, and sued the defendants on the ground that the negligence was the act of their servant. It was held that though the man in charge of the crane remained the general servant of the defendant, yet, as they had parted with the power of controlling him with regard to the matter on which he was engaged, they were not liable for his negligence while so employed.

In his reasons, Lord Esher, M.R., on p. 632, says:—

> For some purposes no doubt the man was the servant of the defendants. Probably, if he had let the crane get out of order by his neglect, and in consequence anyone was injured thereby, the defendants might be liable, but the accident in this case did not happen from that cause, but from the manner of working the crane. The man was bound to work the crane according to the orders and under the entire and absolute control of Jones & Co.

That authority is distinguishable from the case at bar. Here the defendants were not in absolute control. The evidence of Carter, to which our attention was not called on the hearing,

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throws some light on the questions at issue in this suit. Here are some extracts from the evidence of Mr. Carter, the head of the company, Carter-Halls-Aldinger Co.:—

Q. What position did Black hold with your firm? A. Well, he was a sort of what we call a sort of master mechanic, looking after the mechanical equipment of the firm on the different jobs around town. Q. Who was to do the hoisting? A. We would do the hoisting and they (the defendants) would look after putting the material on and off the hoist, putting it on and taking it off; and possibly arrange for the bell man and stuff like that, and we furnish the engine, coal and oil and everything in connection with running the hoist. . . . Q. Your firm was to do the hoisting you say? A. Yes. Q. Who was to operate the engine? A. Well, the engineer would be in charge of the engine. Q. In whose employ would he be? A. He was our employee; he would have to go by rules. Q. As a matter of fact the man Simpson, who was operating this engine was your engineer? A. He was employed by us; paid by us. Q. Who was in charge of the whole of the work in the building? A. I think that George Moffatt was superintendent of the building that day. Q. Who was in control of the hoist? A. The hoist would be operated under Mr. Moffatt's entire supervision. He had entire supervision of everything.

And again, on p. 89, in answer to a question, Mr. Carter describes Black's duties as follows:—

Well, we have a yard out on Notre Dame St. where we remodel and assemble all our hoisting engines, concrete mixers . . . and Jack (Black) looked after the job in a way, looked after the repairs of these engines and concrete mixers and saw that they were in proper shape when sent out on a job, and if anything happened to them when on a job he went there and made such repairs as were necessary . . . or anything like that, fixing bells or skips of hoists and looking after the erection of the skips and hoists and all that stuff; that was Jack's business.

The fact that Elliott, the bell man, was paid by the defendants is not sufficient to establish that Carter-Halls-Aldinger Co. had parted with the power of controlling the machine, and that these defendants were in sole control. This bell-man would be, under the circumstances, as much subject to the order of Black and his signals, as to the signals of the men who were putting the wheel-barrows filled with material on the skip at the bottom and removing it from the skip in the storeys above.

The payment of $1.25 per hour while the hoist was raising the material for these defendants does not establish that the defendants were in sole control, which decided the case in *Donovan* v. *Laing*, [1893] 1 Q.B. 629.

Taking the view that I do, it is not necessary for me to con-

sider whether the principal contractors and sub-contractors were joint tort-feasors or not.

It is clear that the cause of action here is the cause of action sued for in the former suit. It was the same injury, and it seems to me that the observations of Kelly, C.B., in *Brinsmead* v. *Harrison*, L.R. 7 C.P. 547, are equally applicable to this case. On p. 551, Kelly, C.B., says:—

Haggart, J.A.

> In this case a right of action has accrued to the plaintiff in respect of the wrongful detention of a pianoforte. This act was the joint act of two wrongdoers, the defendant and another. The defendant by way of plea alleges that an action was brought for the same cause against the other wrongdoer, and a judgment obtained against her, which remains in full force; and the question is, whether that affords any defence to this action. That a judgment and execution, with satisfaction, would be a defence, is not disputed. A long series of authorities has so laid down; but it was doubted at one time whether judgment and execution, without satisfaction, was a bar also. It will be right, therefore, to consider whether this latter is not upon principle a good and valid defence. If it were held not to be a defence, the effect would, in the first place be to encourage any number of vexatious actions wherever there happened to be several joint wrongdoers. An unprincipled attorney might be found willing enough to bring an action against each and every of them, and so accumulate a vast amount of useless costs, if judgment against one of them did not operate as a bar to proceedings against the others. The mischief would not even rest there. Judgment having been recovered against one or more of the wrongdoers, and damages assessed, if that judgment afforded no defence, the plaintiff might proceed to trial against another of them, and the second jury might assess a different amount of damages. Which amount is the plaintiff to levy?

I agree with the disposal of the case made by my brother Judges. I would dismiss the appeal.

RICHARDS, J.A., concurred.

Richards, J.A.

*Appeal dismissed with costs.*

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## BURROWS v. GRAND TRUNK R. CO.

ONT.

S. C.

*Ontario Supreme Court, Clute, J. May 27, 1915.*

1. RAILWAYS (§ II B—18)—HIGHWAY CROSSINGS—DANGEROUS SUBWAY—LIABILITY FOR INJURIES.

A railway company charged with the duty under the Railway Act (R.S.C. 1906, ch. 37, sec. 241), to maintain safe structures by which any highway is carried over or under any railway, will be liable for injuries resulting from the dangerous condition of a subway constructed by the railway company at the expense of a municipality.

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2. LIMITATION OF ACTIONS (§ II H—70)—ACTIONS AGAINST MUNICIPALITIES —NEGLIGENCE—STATUTORY PERIOD.

Sec. 2 of the Municipal Act, R.S.O. 1914, ch. 192, which bars any action for negligence against a municipality if not brought within three months from the time when the damages were sustained, will also apply to a case where the municipality is added as a party defendant after the expiration of the statutory period, although the action was instituted within the time.

3. EVIDENCE (§ VII D—607)—MEDICAL TESTIMONY—EXPERT OPINIONS — STATUTORY NUMBER.

Sec. 10 of the Evidence Act, R.S.O. 1914, ch. 76, which prohibits the calling of more than three expert witnesses without leave of the Court, is not violated if in connection with the statutory number of experts there is also given the testimony of the attending physician describing the condition of the injured after the accident and that of the physician who made an examination for insurance, but not being regarded as expert witnesses.

4. COSTS (§ I—11*a*)—RIGHT TO—ADDING PARTY DEFENDANT—MUNICIPALITY —NEGLIGENCE.

Costs may properly be allowed a plaintiff where it appears reasonable and proper for him to add as a party defendant a municipality chargeable with negligence.

[*Till* v. *Town of Oakville*, 21 D.L.R. 113; *Besterman* v. *British Motor Cab Co.*, [1914] 3 K.B. 181, followed.]

Statement

ACTION to recover damages for injuries sustained by the plaintiff.

*G. H. Watson*, K.C., and *W. E. Buckingham*, for plaintiff.

*D. L. McCarthy*, K.C., and *W. E. Foster*, for defendant railway company.

*I. F. Hellmuth*, K.C., and *P. Kerwin*, for defendant city corporation.

Clute, J.

CLUTE, J.:—Action for damages for injuries received by the plaintiff from falling concrete while passing under the public foot subway under the tracks of the Grand Trunk Railway Company, in the city of Guelph.

The subway for vehicles was made under the authority of an order of the Dominion Railway Board, amended by a subsequent order of the Board, whereby authority was given to construct a footway east of the carriageway upon land sold by the Grand Trunk Railway Company to the city for that purpose; the same to be constructed by the railway company at the expense of the city.

On the 10th November, 1914, while the plaintiff was passing along Huskison street, in the city of Guelph, and when in the foot subway underneath the tracks of the defendant railway com-

pany, a portion of what is called the cement plaster fell from the ceiling upon the head of the plaintiff, inflicting serious injury. He was found in an unconscious condition, with portions of the plaster upon him, was removed to his home, and was confined to his house from the effect of the injuries for some time; he has not fully recovered.

The subway was, without doubt, in a dangerous condition at the time of the accident, and had been in such dangerous condition for a long time. Both the Grand Trunk Railway Company and the city were aware of its dangerous condition, the company having been expressly notified of the fact by the city.

The subway was under the supervision of the inspector of bridges and buildings for the company. William Caley was the inspector. He says he had no experience prior to his appointment. He lives in Stratford. He heard a few complaints of the condition of the subway in 1912 and 1913, and he directed a plasterer to make the repairs—a Mr. Mahoney. Mahoney made partial repairs, but stated that it was better not to proceed further until spring because of the fear of frost. The repairs were not made by Mahoney personally; he sent his men to do the work, with instructions to drive nails into the cement in order to hold the plaster. He was not present himself. He says: "We looked for holes in the cement; I ordered nails to be driven into the cement, a quantity of nails; I noticed several places where the iron girders were—we found places where it was loose by the girders. The yard square was replaced; I reported that repairs should be done. I would have done it, but it was late, too close to frost. I did not make a thorough job; Mr. Caley, the superintendent, spoke to me about it; I advised him not to have it done till spring; the water was the cause of it coming off. Mr. Caley said he would have it done in the spring. I saw the water come through; I saw the winter was coming on, and I left it as it was. This was in October, 1912. The material produced in Court was the material my men put on. It was not safe to do any more because the water came through."

Caley, the inspector, says that the last witness, Mahoney, may have reported to him that it was better not to do more until spring, owing to the frost conditions. He further states that

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in 1913 it was not completed; that he did not require it to be done. He says there was seepage; that he knew there were pieces falling down from time to time. "I have not the least idea what made it come down. A jar would break it; I always knew it might occur; I saw the condition it was in. I saw that a train passing might bring it down."

A number of other witnesses prove beyond a doubt that it was in a dangerous condition for over a year prior to the accident, and that both defendants knew it and did not take adequate means to make it reasonably safe and fit for use as a subway used by the public.

The writ in this action was issued on the 17th December, 1914. The accident occurred on the 10th November, 1914. The City of Guelph was added as a party on the 4th March, 1915—more than three months after the accident occurred.

I think the claim as against the City of Guelph is barred by sec. 460, sub-sec. 2, of the Municipal Act, R.S.O. 1914, ch. 192. This section provides that "no action shall be brought against a corporation for the recovery of damages occasioned by such default, whether the want of repair was the result of nonfeasance or misfeasance, after the expiration of three months from the time when the damages were sustained." Although the writ was issued within the time, the city was not brought in as a party until the expiration of the period within which action might be brought against it. Otherwise I should have held that the city was, equally with the Grand Trunk Railway Company, guilty of negligence which caused the injuries complained of.

I find that the original structure was defective in its construction, and was in a "crumbling" condition, and was defective and dangerous, for want of repair, and that the repairs which were made were not properly made, and the subway was not made safe. The production of the portions that had fallen shewed that no proper bond had been made between the cement plaster and the concrete; and, as one witness expressed it, "It could not be good," that is, as I understand it, it could not be made safe in that way. The nails were driven in first, and the cement placed around them.

The railway company is, in my opinion, liable under the

Railway Act, R.S.C. 1906, ch. 37, sec. 241 of which provides that "every structure, by which any highway is carried over or under any railway, shall be so constructed, and, at all times, be so maintained, as to afford safe and adequate facilities for all traffic passing over, under or through such structure."

As to the question of damages, the evidence was very contradictory. There were six experts called, three on each side, whose evidence was diametrically opposed to each other, the question being as to whether or not the injuries complained of caused the condition from which the plaintiff is now suffering. A few days prior to the accident, the plaintiff had been examined for insurance, and found to be in a healthy condition. The examining physician was called, and he stated that he found no symptoms of hardening of the arteries, and that the plaintiff was in good health. Other evidence shews that he continued to manage his business down to the time of the accident; that he has not been able to manage his business since; and that the probability is, taking the most favourable view, that he will not be able to attend to his business for at least from two to three years. He drew from his business about $1,400 a year for himself. There was evidence called to shew that a man with his expert knowledge could command from $1,500 to $2,500 a year. I do not accept as reasonable the large claim for damages made by the plaintiff; but, after a careful consideration of all the circumstances, I find that $3,500 would be a reasonable sum to allow, and I assess the damages at that sum.

Objection was taken by Mr. McCarthy that more than three experts were called by the plaintiff without making a request for leave prior to their being called.* I did not regard nor did I act upon the evidence of any of the witnesses called by the plaintiff as expert evidence, except the three doctors, namely, Dr. Alfred Thomas Hobbs, Dr. MacAllan, and Dr. Barnes. Two other doctors were called by the plaintiff: the one, Dr. Torton, was the

*Section 10 of the Evidence Act, R.S.O. 1914, ch. 76, provides: "Where it is intended by any party to examine as witnesses persons entitled, according to the law or practice, to give opinion evidence, not more than three of such witnesses may be called upon either side without the leave of the Judge or other person presiding, to be applied for before the examination of any of such witnesses.

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attending physician, who simply described the condition in which the plaintiff was after the accident, and Dr. Savage, who made the examination for insurance.

The plaintiff is entitled to judgment against the Grand Trunk Railway Company for $3,500, with costs; and, inasmuch as the company in its correspondence with the plaintiff's solicitor took the ground that the City of Guelph was liable, I find that it was reasonable and proper that the plaintiff should add the city as a party, and that the plaintiff is entitled to include the costs incident to the City of Guelph being added a party as part of the plaintiff's costs in the cause—under the authority of *Till* v. *Town of Oakville* (1915), 21 D.L.R. 113, and *Besterman* v. *British Motor Cab Co.*, [1914] 3 K.B. 181. As I entertain no doubt that the City of Guelph was negligent in regard to seeing that the repairs were properly done upon the subway, it is not entitled to costs, and the action as against the City of Guelph is dismissed without costs.

*Judgment accordingly.*

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MAN.

C. A.

## PULFORD v. BURMEISTER.

*Manitoba Court of Appeal, Howell, C.J.M., Cameron, and Haggart, JJ.A. April 30, 1915.*

1. APPEAL (§ VII L 3—485)—REVIEW OF FINDINGS OF COURT—HEARING OF INTERIM INJUNCTION.

In reviewing upon appeal an interim injunction order, whereby the injunction was continued until the trial unless the defendant gave security for an accounting, the appellate court may direct that the findings on any question of law or fact or upon the construction of the documents by the judge who made the injunction order shall not be binding on the parties at the trial of the action.

Statement

APPEAL from an order for an injunction.

The judgment of the Court was delivered by

Howell, C.J.M.

HOWELL, C.J.M.:—It seems to me the entire case turns upon the contents of ex. 1 together with the meeting that was held on December 7, 1914. This ex. 1 may, and probably would be construed in the light of its surroundings, and particularly in the light of the transactions at the meeting when this constitution was adopted. One man swears that it was not to be limited to the year 1914. The minutes seem to indicate that it was for that

year. How that fact will be established in the Court, it is impossible for me to say.

Apparently the partnership of 1913 was dissolved, if I read correctly the allegation in the statement of claim, and a new partnership apparently was formed for 1914.

I desire particularly to express no opinion as to the construction that is to be put upon ex. 1, because evidence at the trial might greatly vary its meaning.

The plaintiff alleges that he has a property right which this partnership has acquired. He claims that he has a property right which that partnership is now using and he is deprived of the benefit of it. He claims also that he is still a member of that partnership. If he is, then he will be entitled to any profits that are made by the defendants.

I think that this case should be tried entirely apart from the decision of Mr. Justice Curran. If it goes down to trial with that judgment standing in its present shape, the trial Judge would probably feel himself bound to follow his decision. The plaintiff alleges a partnership. The learned Judge did not dispose of the case at all on partnership grounds, so it seems to me the case should be heard as if a judgment had not been given by Mr. Justice Curran.

I have asked Mr. Justice Cameron to prepare a clause to be entered in the order covering this part of the case, and it is as follows:—

> It is ordered that at the trial the findings of the Hon. Mr. Justice Curran in his judgment on the motion, on any questions of law or fact or upon the construction of the documents filed, shall not be deemed in any way binding or conclusive on the parties.

The order for the injunction must be set aside, the costs of the motion before Mr. Justice Curran and of this appeal will be costs in the cause to the successful party.

*Judgment accordingly.*

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S. C.

## WHYTE v. NATIONAL PAPER CO.

*Supreme Court of Canada, Fitzpatrick, C.J., Davies, Idington, Duff, and Anglin, JJ. February 15, 1915.*

1. PRINCIPAL AND AGENT (§ III—36)—RIGHTS OF AGENT—COMPENSATION—ACCEPTED ORDERS—CANCELLATION—EFFECT ON COMMISSIONS.

An agreement by a manufacturing company to pay their agent a stipulated commission on all "accepted orders" obtained by him as soon as the orders are shipped, entitles the agent, upon obtaining an order, to recover his full commission on the whole order even though only part of the order had been shipped and the remainder had been countermanded by the purchaser.

[*Whyte* v. *National Paper Co.*, 17 D.L.R. 842, reversed.]

Statement

APPEAL from the Supreme Court of Ontario, *Whyte* v. *National Paper Co.*, 17 D.L.R. 842.

*Hamilton Cassels*, K.C., for appellant.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—The appellant's case is that he was entitled under the agreement with the respondent company to a commission "on all accepted orders," which is in the circumstances the equivalent of "all sales, whether followed by delivery or not," and that the contract with the Buntin, Reid Co. is a sale within the meaning of that commission agreement.

The whole case, therefore, depends upon the nature of the latter contract. I have no doubt that for the reasons given by Mr. Justice Middleton, the Buntin, Reid order once accepted constituted an agreement binding upon both parties to it. It contains the essential elements of a contract of sale, the thing sold is properly described and the respondents were thereafter entitled to the benefit of that contract if they wished to enforce it. That agreement should, in my opinion, be treated as an accepted order.

The trial Judge found, and that finding is not disturbed, that the Buntin, Reid Co. was able to pay for the goods and that the default in carrying out the agreement was wholly attributable to the respondent company. The appellant is, therefore, entitled to his commission.

It is urged that with the concurrence of the appellant a rebate of 10c. a hundred pounds on paper to be supplied under the contract was to be allowed the Buntin, Reid Co. There is

no doubt that such an arrangement was made, and the only question is: Who was to pay the rebate?

I would be disposed to hold that the evidence is not sufficient to justify the deduction of that rebate out of the appellant's commission, but out of deference to the opinions of my brother Judges, I agree that the deduction should be made.

I would allow the appeal for the balance with costs.

Fitzpatrick, C.J.

DAVIES, J.:— I concur with MR. JUSTICE ANGLIN.

Davies, J.

IDINGTON, J.:—The respondent by a letter dated January 15, 1912, agreed to pay appellant a commission of five per cent. on all accepted orders.

Idington, J.

He, acting thereunder, procured a binding contract duly executed between the Buntin, Reid Co. and respondent whereby the former bound themselves to purchase from the latter during a period of one year, not less than thirty-five thousand dollars worth of paper at a price named, and of a kind specified, to be fully up to the standard of samples submitted, and to be shipped as directed, from time to time to points named in Ontario.

It is contended that contract was not, though duly executed and binding upon the purchaser, an order within the meaning of the said obligation.

The learned trial Judge held it was such an order and entered judgment accordingly but the Appellate Division, holding it was not such an order, reversed the judgment.

The first, and as Mr. Justice Middleton appropriately calls it the dominating and controlling, clause of the letter of the contract is followed by a paragraph therein which is relied upon by the Appellate Division. It provides that

> this commission shall be payable immediately the order is shipped, and failing the customer paying the account, we shall deduct from the first settlement with you the commission paid on said order.

If this term "shipped" is to be construed as the Appellate Division seems to hold, it would have been quite competent for the respondent to have dishonoured every order got, no matter how much labour or expense appellant may have been put to in obtaining same. I cannot think that ever could have been contemplated by the parties; so the term "shipped" must be

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given a more reasonable meaning and not as applicable to what might but for the default of the respondent have been shipped.

Then the provision that the commission might have been deducted in the event of the customer failing to pay, certainly cannot apply to the case of non-shipment. It seems clearly pointed to the sensible meaning of the case of the customer through want of means or failure to meet his obligations making default in payment. It certainly, even in such a case does not extend to a time when the customer had ultimately paid. It is not necessary to solve all the riddles within the expression, but as I read that, it was designed, merely to secure orders being got from first-class customers, of good financial standing, and thus to enlist the assistance of appellant in securing the easy collection of accounts.

It does not seem to me that either of these terms of that clause were designed to cover the case which has arisen.

The Buntin, Reid Co.'s firm admittedly stands high in the commercial world and no question can arise as to their financial responsibility.

It seems they refrained from giving specifications for further deliveries because of respondent having failed to live up to its contract. If so the appellant is not to be deprived of his commission on their accepted order, any more than the real estate agent, whose commission has been earned by a mere introduction or actual sale, no matter how little may come of the transaction later through any one of a multiplicity of causes likely to arise in such dealings.

If this order failed through no fault of respondent to produce the specifications enabling delivery within its terms, then a right of action accrued to the respondent against the Buntin, Reid Company for damages which would include (not in terms but incidentally by reason of the legal measure of damages in such a case) this very commission.

It would be somewhat anomalous if, after defeating appellant here, respondent sued and got such damages. How could Buntin, Reid & Company answer their default and ask any consideration for what had happened in this action

If respondent failed by reason of its own default then it surely cannot be excused herein.

It seems to me that it never was intended the provision in this second clause meant any more than that on the one hand the time of shipment was a convenient term for payments, and to be read as if shipped or ought to be shipped, and on the other hand a spur to stimulate appellant and not a means of depriving him ultimately of all compensation.

The third clause seems to put that beyond doubt. It is as follows:—

> You shall have the exclusive agency for the Province of Ontario with the above exception, and at any time this agreement should cease we shall pay you on all accepted orders up to the termination of this agreement.

His engagement ceased before this action and this term of the contract thus came into operation.

I think the appeal should be allowed with costs here and below and the trial judgment be restored.

Since writing the foregoing I find some of my brother Judges proceeding upon a ground neither taken in the pleadings nor in the notice of appeal to the Appellate Division nor in the factums here, to cut down the amount claimed. Indeed, the factum of respondent signed by able and experienced counsel puts the matter in dispute in appeal neatly thus:—

> So that the issue is narrowed to the question whether or not the respondents are bound under the terms of the documents hereinafter set forth to pay to the appellant a commission on paper which has never been supplied because orders specifying the necessary particulars of same were never received. In other words, the question in dispute is narrowed to whether or not the respondents should pay the said sum of $1,491.36.

I most respectfully dissent from such a departure from the grounds upon which the case has heretofore proceeded.

DUFF, J., dissented.



ANGLIN, J.:—I am, with respect, of the opinion that this appeal should be allowed and the judgment of the learned trial Judge restored, subject, however, to a reduction in the amount of the plaintiff's recovery as stated below.



On one possible construction of the agreement between the plaintiff and defendants his commission was earned when the

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defendants saw fit to accept the offer, or order, which he had procured for them from The Buntin Reid Co. In that view his right to payment would arise when the order was shipped, or, in the event of the order not being filled, when the time for filling it according to its terms had elapsed. The defendants might have declined to accept the order in the form in which it was procured. They might have insisted upon its being in such form that further specification by the purchasers would not be necessary. They saw fit to accept it, and it may be that it was an "accepted order" within the meaning of that term in their agreement with the plaintiff. But I am not altogether satisfied that the construction put upon the correspondence by the Appellate Division was not correct, namely, that "accepted orders" meant orders upon which, without further specification of the goods to be supplied, the defendants should be entitled to make delivery and thereupon to sue for the price. I proceed to deal with the case on this footing.

The order, if it may be so termed, obtained by the plaintiff from the Buntin Reid Co. was subsequently filled in part. That it was not wholly filled was, on the evidence, due to the failure of the defendants to furnish, upon the specifications which were sent them by the Buntin Reid Co. goods of a satisfactory quality and in compliance with their obligations. It may be that the defendants' failure to supply satisfactory goods upon these early specifications did not relieve the Buntin Reid Co. from their obligation to send in further specifications to the extent stipulated in their contract. But if the failure of the defendants to obtain such further specifications and directions for shipment was ascribable to their own default in supplying goods of a merchantable quality and in compliance with the contract, whatever may have been the effect upon the legal rights of the defendants and the Buntin Reid Co. *inter se*, the plaintiff was thereby prevented from becoming entitled to payment of his commission, if, in order that he should become so entitled it was necessary that the Buntin Reid Co. should send in specifications and directions for shipment. Under these circumstances the plaintiff would be entitled to recover damages from his principals. If he had done all that was incumbent upon him in

order to earn his commission on the Buntin Reid order, and if the sole reason why the contract made through him was not fully carried out was the default of the defendants, his damages would be the amount of the commission itself. If there was still something to be done by him in the discharge of his duty to the defendants—for instance, if it was part of his obligation to procure the actual specifications and shipping directions from the Buntin Reid Co. and he had not taken the steps necessary for that purpose, although he had omitted to do so solely because he knew it would be labour wasted in view of the refusal of that company to take further shipments—his damages would be somewhat less than the full amount of his commission. I am not satisfied that it was part of the plaintiff's obligation to procure such specifications and shipping directions. Had it not been for the defaults of the defendants in regard to the early shipments, further specifications and shipping directions would, in all probability, have come to them from the Buntin Reid Co. without any further solicitation or intervention on the part of the plaintiff. But upon the evidence it appears that the plaintiff in fact did his utmost to obtain such further specifications and directions and that his efforts proved unavailing solely because the Buntin Reid Co. declined to take chances of incurring liability for damages to their own customers through supplying to them such defective and unmerchantable goods as the defendants had furnished upon the first specifications sent to them. These defaults of the defendants were beyond any reasonable doubt the real cause why the Buntin Reid Co. did not take from them goods in quantity greater than the minimum of $35,000 worth stipulated for in their order or contract. But for those defaults the defendants would, in all human probability, have had from the Buntin Reid Co. demands for paper in excess of the minimum quantity specified in their contract. In point of fact the Buntin Reid Co. purchased, during the currency of their contract with the defendants, from other paper mills, at a price materially higher than that which they had agreed to give to the defendants, $46,940.23 worth of paper of the class and quality covered by their contract with the defendants. If, therefore, the plaintiff did not fully earn his commis-

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sion by procuring an order which the defendants accepted, and if in order to fully earn it he was further obliged to obtain specifications and shipping directions from the Buntin Reid Co., he was prevented by the default of the defendants themselves from obtaining such specifications and directions although he made the necessary efforts to do so, and in that view of the case he is entitled by way of damages to a sum equivalent to the commission which he was thus prevented from earning.

The respondent objects that in his statement of claim the plaintiff confines his demand to the recovery of commission *eo nomine* and does not prefer an alternative claim for damages on the footing that the defendants had prevented his earning his commission, and that he should not now be allowed to recover on such an alternative claim. In his reply, however, the defendant alleges the facts necessary to support such an alternative claim, and at the trial these facts, which could be relevant only if a claim for damages on the basis indicated was to be considered, were fully gone into in evidence. Under these circumstances there is no difficulty in dealing with the case as if a prayer for the alternative relief had been formally included in the statement of claim. Nor can the defendants very well object to this being done, since it was pressed at bar on their behalf that a matter of defence presently to be dealt with, which they did not plead and to which I find no allusion in the judgment of the trial Judge, in their reasons of appeal to the Appellate Division, or in their factum in this Court, should now be taken into consideration.

The defendants allege that when the bargain with the Buntin Reid Co. was made, it was arranged, with the concurrence of the plaintiff, that the purchasers should be allowed a rebate of ten cents a hundred pounds on paper to be supplied under the contract, and that this rebate should be paid by the plaintiff out of his commission. That an arrangement for such a rebate was made is common ground. The plaintiff, however, denies that he was to pay it. Although this arrangement is not pleaded in the statement of defence, nor alluded to in the Appellate Division, nor in the respondents' factum, it was investigated at the trial. The evidence upon it of the plaintiff and that of the de-

fendants' manager is in direct conflict. The question, however, is concluded against the plaintiff, in my opinion, by two letters written by him to the defendants on April 19, 1913, and April 30, 1913, in the first of which he says:—

> I refuse to further continue allowing them (The Buntin, Reid Company) a rebate on my portion of that commission,

and in the second, alluding to this former letter, he speaks of

> the continuance of allowing them a rebate of a portion of the commission paid me.

These letters are not satisfactorily explained. While the agreement for the rebate was discreditable to the defendants, it was not of such an illegal or illicit character that they are precluded from claiming the benefit of it as against the plaintiff. Calculated on the basis of the price mentioned in the contract, the plaintiff's full commission of 5 per cent. would amount to 32½ cents on every hundred pounds of paper to be supplied. Deducting from this ten cents per hundred pounds would leave his net commission 22½ cents per hundred pounds. His recovery for commission at the trial, where this partial defence was not given effect to, was $1,596.43 of which $1,491.36 represented commission on the Buntin Reid order. This would be at the rate of 32½ cents per hundred pounds. The ten cents a hundred pounds rebate would amount to $458.88. Deducting this sum from the total recovery, $1,596.43, there is a balance of $1,137.55 and that is the sum for which the plaintiff is, in my opinion, entitled to judgment.

I think the plaintiff should have his costs of the appeals to this Court and the Appellate Division, as well as his costs of the action.

*Appeal allowed with costs.*

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## THE DOMINION LUMBER CO. v. THE HALIFAX POWER CO.

N. S.
S. C.

*Nova Scotia Supreme Court, Sir Charles Townshend, C.J., and Russell, Longley, and Ritchie, JJ. January 16, 1915.*

1. DAMAGES (§ III K 2—216)—INJURY TO LAND—CUTTING TIMBER—MEASURE OF DAMAGES.

In assessing damages against a lumber company for entering and cutting timber on lands of another company there may be allowed, in addition to the stumpage valuation, damages for the occupation of the land while the lumbering operations were going on, the consequent construction of roads through the woods and the felling of trees for that purpose, and damages because of the trees cut having been young

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and unmatured which would have been of more value to the land-owner had they been left standing.

APPEAL from the judgment of Graham, E.J.

*H. Mellish*, K.C., and *F. H. Bell*, K.C., for appellant.

*T. S. Rogers*, K.C., for respondents.

RITCHIE, J.:—I am of opinion that the appeal should be dismissed with costs for the reasons stated in the judgment appealed from, and in the judgment of the Court in the *Halifax Power Co. v. Christie*.

It is contended that the damages are excessive. The amount awarded is, I think, more than is usually allowed for stumpage, but it is obvious that this is no test. In each case the amount of the damages, of course, depends upon the evidence in the particular case. The damages are assessed by the Judge at $4,700. Cruik, who represents the defendant company, admits that between 800,000 and 900,000 feet was taken by his company. I don't think he was likely to overstate the quantity taken. It cannot, I think, be unfair to place the quantity at 850,000. At $5 per thousand this would bring the damage up to $4,250. As to whether $5 per thousand is too high or not depends, like any other question of fact, upon the evidence. There is evidence for and against $5 being the true value per thousand. John Miller and Christie put the value at the figure named. Starratt says $5.50 or thereabouts. I think the Judge must have believed these witnesses in preference to the witness on the other side, and I do not know how or upon what principle I can say he was wrong. He saw and heard the witnesses and I did not. It is not a question of the assessment of damages on a wrong principle, but purely a question as to witnesses the Judge believed. I take $5 per thousand as the value of the stumpage. When the value of the stumpage is in issue the situation is an important factor. Trees of the same value when hauled to the mill may be worth much more in one place than in another when cut. In this case Christie says:—

> $5 is correct because it is no distance to drive it, and not far to haul it, and it can be made a very cheap operation. Not far to take supplies

If $4,250 is the correct amount to allow for the actual stump-

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age, as I think it is, $450 is left for consequential damages. Here the important inquiry is, had the trees arrived at maturity or not? These trees had not. They were young spruce, would increase in value if left to grow for ten years. Lumber not at maturity is of more value standing than when cut. The inquiry therefore goes beyond the mere destination of the trees. For this element of damages I do not think $450 is too much.

Ritchie, J.

I have not in coming to this conclusion taken into consideration the wrongful taking, the occupation of the land while the operations were going on, the necessary construction of roads through the woods which must involve the felling of trees, but it seems to me these things would not be improper elements for consideration in estimating the damages.

In my opinion there is ample support in the evidence for the finding as to damages. I therefore decline to interfere with it.

SIR CHARLES TOWNSHEND, C.J.:—I concur. Though the damages seem large I am unable to see any principle on which we can reduce them.

Sir Charles Townshend, C.J.

RUSSELL, J.:—I am of the same opinion as the Chief Justice.

Russell, J.

LONGLEY, J.:—I concur in the general result except that I think the damages are too high. Five dollars a thousand is an excessive amount. Any lumberman would regard it as excessive. I think three dollars a thousand would be abundantly sufficient and that such amount per thousand would be adequate.

Longley, J.

*Appeal dismissed.*

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## McGILLIVRAY v. KIMBER.

N. S.

S. C.

*Nova Scotia Supreme Court, Sir Charles Townshend, C.J., Graham, E.J., and Russell, and Longley, JJ. January 12, 1915.*

1. SHIPPING (§ I—2)—REGULATION OF PILOTAGE—REVOCATION OF LICENSE—RIGHT OF ACTION.

The granting and withdrawal of a pilot's license by the local pilotage authority under the Canada Shipping Act, R.S.C. 1906, ch. 113, is a quasi-judicial act and no action will lie for its error in proceeding *ex parte* on cancelling a license unless malice is alleged and proved.

[*Harman* v. *Tappenden*, 1 East 555; *Dicas* v. *Coulton*, 1 East 563*n* referred to.]

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Graham, E.J.

APPEAL from the judgment of Drysdale, J.

TOWNSHEND, C.J., concurred with GRAHAM, E.J.

GRAHAM, E.J.:—The defendants at the time of the grievances constituted the Sydney Pilotage authorities under the Canada Shipping Act, R.S.C., 1906, Part VI., ch. 113, appointed by the Governor-in-Council.

The plaintiff was a licensed pilot under this pilotage authority holding a license granted annually. The form of one of the licenses, Form 2, in the Act is given in the printed case as follows:—

Dominion of Canada.

Pilotage District of Sydney, in the County of Cape Breton.

We, F. C. Kimber, Sec'y.-Treas; V. Mullins, Chairman; Captain Thomas Desmond, R. T. Vooght, and A. McKinnon, being the Pilotage authorities, having by law power to examine and license pilots for the Pilotage District of Sydney in the County of Cape Breton, do hereby certify that John B. McGillivray of Low Point, C.B., having been duly examined by us has been found in all respects duly qualified and is deemed by us to be a fit person to undertake the pilotage of vessels of every description within and throughout the said pilotage district of Sydney in the County of Cape Breton, and on the seventh day of August, A.D. 1913, is by us licensed to act in that capacity for one year.

This certificate shall not be lent or transferred and can be used for the ports of Sydney and North Sydney only.

Description of John B. McGillivray. No. 15.

Age, 64. Height, 5′ 8″. Complexion, light. Colour of hair, brown. Colour of eyes, grey. Marks. Remarks.

Signed, VINCENT MULLINS,
*Actg. Sec't'y. to Commission.*

There is a fee for license of $10, and a bond.

At a meeting of the Pilotage Commissioners held June 13, A.D. 1912, the plaintiff's license was cancelled and he ceased to be a licensed pilot. Two others were dropped at the same time. The reasons assigned were neglect and incompetency and a resolution was passed dismissing him.

The next year, August 4, 1913, a meeting was held and a fresh license was conferred upon this pilot. It appears that there were but two of the pilot commissioners present at the meeting and for this reason it was invalid. At a meeting held on October 6, 1913, a resolution was passed refusing on account of the irregularity to recognize the plaintiff as a pilot acting under

the authority of this Board. Meanwhile he received his proportion of the pilotage dues for one month and part of another, but that fact is not material now.

He has brought this action and the learned Judge has given him damages in the sum of $1,800 as for a wrongful dismissal on the ground that there was no notice or investigation. That is, it was *ex parti*. It is practically conceded that there should have been an investigation after notice. But the defendants contend on the appeal that the relation between the pilotage authority and the pilots is not a contractual one, that there is a licensing of a pilot and power to cancel the license under this Act, that this being a quasi judicial Act there is no remedy by action for damages unless malice is alleged and proved.

In my opinion under the statute mentioned and the by-laws applicable to this pilotage district there is not a contract between the pilotage commissioners and the pilot. The license to which I have already called attention indicates that the licensing is a quasi judicial thing and the words of the statute indicate that the withdrawing of the license is of the same character. Indeed, under the English statute from which these provisions are largely taken, the pilot is given an appeal. Temperly and Moore on Shipping, 353. I have no doubt that here he would have the right to apply for a writ of *certiorari* or a mandamus.

The scheme of payment for the services of a pilot is this: the Commissioners collect the pilotage dues from each ship arranged according to a scale and they distribute among the pilots under their jurisdictional limits a proportion of these dues monthly. The limit of pilots for this Sydney district is thirty-two, but there was not that number licensed.

One has but to look at the sections of this part to come to the conclusion that the Acts of licensing and of withdrawing a license are quasi judicial acts and that there is no contract of hiring.

The premises of the judgment is founded on that idea because it says there should have been an investigation and notice.

I refer to secs. 443, 445 and following 450, 514, 552, 553 and the by-laws.

Then if the withdrawal of the license is a quasi judicial act

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it is clearly established that no action will lie for the error in proceeding *ex parti* unless malice is alleged and proved. I refer to the cases of *Harman* v. *Tappenden*, 1 East 555; *Drew* v. *Coulton*, 1 East 563*n*; Pollock on Torts, page 311; Piggott on Torts, 187.

There were a number of American cases cited to the same effect. I only mention one of them because it is a case of revoking a pilot's license: *The Downer Case*, 6 Cal. 94, reported in 65 American Decisions 489.

I also refer to *Earl of Derby* v. *Bury Improvement Com.*, L.R. 4 Ex. 222, Willes, J.; *Walker* v. *Nottingham*, 28 L.T. 308, Bramwell, B. I think the action is misconceived in other respects. I refer to *Mayor of Salford* v. *Lancashire*, 25 Q.B.D. 384.

The appeal must be allowed and the action dismissed with costs.

Russell, J.

RUSSELL, J., concurred with GRAHAM, E.J.

Longley, J.

LONGLEY, J.:—The defendants were a board of pilot commissioners acting as the Sydney pilotage authority and the plaintiff was a pilot who had the authority of these commissioners to serve and was making a living out of the profits.

In the month of April, 1912, the pilot commissioners dispensed with the services of the plaintiff. They have authority to do this, but it is only after sworn evidence and an examination is held, and they had no power to put him out of office without.

The plaintiff then brought an action against the Commissioners for his wrongful dismissal, claiming considerable damage for such dismissal. It came on for trial and Mr. Justice Drysdale's judgment was given for the plaintiff and damages were assessed at $1,800.

The matter was brought into this Court by way of an appeal, and then for the first time the point was taken that the pilotage commissioners were a body discharging the duties of a judicial body and that an action could not be brought against them for acts in their judicial capacity. The matter was given careful consideration, because, undoubtedly, the commissioners were wrong in dispensing with the services of the present plaintiff without fair reasonable investigation. The only course which he

could have pursued in the past would have been either to have brought up the matter in Court in the way of a writ of *certiorari* or to have come in and demanded a writ of mandamus. The action such as the present brought against the commissioners is contrary to law and the only alternative is to grant the present appeal and dismiss the present action with costs.

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*Appeal allowed; action dismissed.*

## PEART BROS. HARDWARE CO. LTD. v. BATTELL.

SASK.
S. C.

*Saskatchewan Supreme Court, Haultain, C.J., Lamont and McKay, JJ. July 15, 1915.*

1. MECHANICS' LIENS (§ IV—15)—STATUTORY LIEN FUND—EXTENT OF—HOW AFFECTED BY CONTRACT.

The fact that a contract provides that twenty per cent. of the amount of the progress certificates should be retained by the owner and should be paid within thirty days from the completion of the work does not in any way affect the statutory obligation on the owner to deduct twenty per cent. from any payments to be made by him in respect of the contract, namely, twenty per cent. out of the eighty per cent. of the progress certificates, in virtue of sec. 11(1) of the Mechanics' Lien Act, R.S. Sask., ch. 150.

2. MECHANICS' LIENS (§ II—5)—STATUTORY LIEN FUND—RIGHTS TO—APPLICATION OF BY OWNER.

The statutory amount of payment which the owner may retain by virtue of sec. 11(1) of the Mechanics' Lien Act, R.S. Sask., ch. 150, forms a fund available for the lienholders only, to which the owner cannot resort as security against or to make good any loss occasioned by the non-compliance of the contract.

[*Russell* v. *French*, 28 O.R. 215; *Rice Lewis & Sons* v. *Harvey*, 9 D.L.R. 114, followed.]

Statement

APPEAL by defendant from a judgment of the trial Judge.

*G. E. Taylor*, K.C., for appellant Battell.

*H. J. Schull*, for respondent, the Security Lumber Co.

The judgment of the Court was delivered by

Haultain, C.J.

HAULTAIN, C.J.:—The defendants Battell and Phillips, on November 28, 1912, entered into an agreement in writing by which Phillips agreed to build a certain building for Battell for $11,800 upon the terms and conditions mentioned therein.

Provision was made for payments upon progress estimates, 80 per cent. of the amount of each estimate to be paid when certified by the architect, and the balance of 20 per cent. to be paid "within 30 days of the completion of the work," and upon other conditions mentioned in the contract.

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Provision was also made for payment direct by the owner, to the persons entitled, for wages or material in the event of the contractor failing to pay the same. Such payments were to be deemed as payments to the contractor.

Early in May, 1913, the contractor Phillips abandoned the contract and Battell had the work completed. At the time the contract was abandoned, progress estimates to the amount of $10,800 had been certified by the architect, of which amount $6,500 was paid to Phillips. At the time the contract was abandoned Phillips owed large amounts for painting and plumbing to his sub-contractors and they refused to finish their work until Battell agreed to settle with them. A settlement was made by which they were to finish their work, and Battell became liable for the whole amount due, or to become due to them: $3,200 for plumbing, and $1,300 for painting.

On May 8, 1913, after the abandonment of the contract by Phillips and the arrangement with the above mentioned sub-contractors, the plaintiffs, the Security Lumber Co. Ltd., served notice of their lien for lumber supplied to Phillips.

The present action was begun by the plaintiffs Peart Brothers Hardware Co. Ltd., to enforce their lien, and the other plaintiffs and the defendant George S. Perkins were subsequently added as parties to the action, the carriage of which was given to the Security Lumber Co. Ltd.

By consent of parties the trial was confined to one issue, and the learned trial Judge found in favour of the plaintiffs against the defendant Battell, and held that the plaintiffs were entitled to a charge upon the property in question for the amount of $6,284, the difference between the amount of $10,800 and the amount of $4,516, which he found was actually paid to the contractor. From this decision the defendant Battell appeals.

A consideration of secs. 4, 9, 10 and 11 of the Mechanics' Lien Act (R.S.S., ch. 150), leads me to the conclusion that most of the difficulty in this case has arisen from a misapprehension of the effect of these sections on the part of the learned trial Judge and counsel on both sides, and a consequent miscalculation of the amounts involved.

Section 11(1) provides that the owner shall, as the work is

done or materials furnished under the contract, deduct from *any payments to be made by him in respect of the contract* and retain for a period of thirty days after the completion or abandonment of the contract 20 per cent. of the value, etc. (as in sec. 11).

In this case, the value of the work done under the contract was $10,800. This is the total amount of the progress certificates up to the time of the abandonment by the contractor. By the terms of the contract 80 per cent. of the amount of the progress certificates was payable to the contractor. The total amount payable to the contractor, therefore, under the contract, was $8,640. But it was the duty of the owner, as prescribed by sec. 11(1), to deduct from this amount 20 per cent. of the whole work done, or $2,160, to be retained as provided by the Act. The fact that the contract provided that twenty per cent. of the amount of the progress certificates should be retained by the owner and should be "paid within thirty days from the completion of the work" and upon the other condition expressed in the contract, does not in any way affect the statutory obligation on the owner to deduct twenty per cent. from *any payments to be made by him in respect of the contract*, which were 80 per cent. of the progress certificates.

Sec. 11(1) further provides that liens created by the Act shall be a charge upon the amount directed to be retained by that section in favour of the sub-contractors whose liens are derived under persons to whom such moneys so required to be retained are respectively payable. The amount of $2,160 should, therefore, have been retained out of the 80 per cent. of the progress certificates, and "forms a fund for the lienholders and thereafter it is available for them only and not as a fund to which the owner can resort as security against or to make good any loss occasioned by the non-completion of the contract." *Russell* v. *French*, 28 O.R. 215, *per* Rose, J., at 220; *Rice Lewis & Sons* v. *Harvey and Rathbone*, 9 D.L.R. 114.

The position in the first week of May, 1913, therefore, was, that (1) $10,800 worth of work, etc., had been done. (2) $6,480, less the amount already paid, was payable to the contractors in respect of the contract. (3) $2,160 was subject to a charge in favour of lienholders. (4) $2,160 was payable to the contractor

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"within thirty days of the completion of the work" as provided in the contract.

There seems to be some doubt as to the amount actually paid to the contractor. The evidence seems to me to shew a total payment of $6,500, while the learned trial Judge states the amount to be $4,516. In view of what follows, this difference is not material.

Accepting the learned Judge's figures, there was an amount of $1,974 still payable to the contractor at the time above mentioned. During the first week of May the sub-contractors for painting and plumbing refused to proceed with their work until the owner undertook to pay them for the work already done by them as well as for the balance of the work remaining to be done. Payment was accordingly made by the owner to these sub-contractors of amounts then due to them by the contractor considerably exceeding $2,000. These payments were quite legitimate under the express terms of the contract as well as under sec. 12 of the Act, so long as it did not affect the percentage to be retained by the owner as provided by sec. 11.

The amount paid to these sub-contractors, therefore, cannot be allowed to reduce the amount of $2,160 which I have already held to be available for the lienholders. Even if there was a balance of $1,964 still due to the contractor, the *bonâ fide* payment of that amount to sub-contractors entitled to liens, before May 8, when notice of lien was served by the Security Lumber Company, would still have left the statutory deduction of $2,160 intact, and would further bring the payments within the provisions of sec. 11(2). As there would be no other amount payable to the contractor under the contract, the question as to the right of the owner to set up his damages for failure to complete against the claims of lienholders other than wage earners does not arise.

The amount of $2,160 retained under the contract is not payable until after the completion of the work, and then only upon the condition set forth in the contract. Further than that, the amount required to complete the work over and above the contract price far exceeds this amount of $2,160, and it would appear that lienholders other than wage earners would under those

circumstances have no claim on this amount. *Rice Lewis & Sons* v. *Harvey and Rathbone, supra; Travis* v. *Breckinridge*, 43 Can. S.C.R. 59. The reference in the last-mentioned case is to the unreported judgments.

As to the position of the Peart Bros. Hardware Co. Ltd.

On the application of the defendant Battell, the appellant, a number of lienholders, including the Security Lumber Co. Ltd., were made parties to the action which was originally brought by the Peart Bros. Co., and later on the conduct of the action was given to the Security Lumber Co. Ltd.

I quite agree with the learned trial Judge that it was not necessary for the Peart Bros. Co. to take any further active part in the proceedings, and that it cannot be held to have abandoned its claim.

The judgment appealed from will, therefore, be varied by reducing the amount of $6,284 mentioned therein to $2,160.

As on ten out of the eleven grounds of appeal the appellant fails, and as on the remaining ground his whole argument was that the lienholders were not entitled to anything at all, I think there should be no costs of appeal.

*Judgment varied.*

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## PEACOCK v. WILKINSON.



*Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. March 15, 1915.*

1. PRINCIPAL AND AGENT (§ II C—20)—AGENT'S FRAUD—WHAT CONSTITUTES—SALE OF LISTED PROPERTY BY REAL ESTATE BROKER.

A sale of land by a real estate broker on behalf of the owner who placed it for listing without any formal contract of sale having been entered into between the purchaser and the owner, on assurance by the broker that the owner will abide by the sale, does not constitute a fraud on his part so as to render him liable, upon the failure of the owner to convey, for the loss sustained by the purchaser in a subsequent sale of the land on the strength of the broker's assurance.

[*Peacock* v. *Wilkinson*, 18 D.L.R. 418, affirmed.]

2. BROKERS (§ II A—5)—REAL ESTATE BROKERS—LISTED LANDS—AUTHORITY TO SELL.

Where a principal has merely instructed a broker to place lands on his list of properties for sale such "listing" does not of itself constitute an authorization to the broker to enter into a contract for the sale of the lands on behalf of his principal.

[*Peacock* v. *Wilkinson*, 18 D.L.R. 418, affirmed.]

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PEACOCK v. WILKINSON.

APPEAL from the judgment of the Supreme Court of Saskatchewan, 18 D.L.R. 418, reversing the judgment of Johnstone, J., 15 D.L.R. 216.

*J. F. Frame*, K.C., for appellant.

*Balfour & Co.*, for respondents.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—I am disposed to agree with the trial Judge because I am satisfied that the reckless statements made about the title by the defendants cannot be reconciled with that good faith which should exist in cases like this, but I defer to the opinion of the Court below and of the majority here.

The appeal is dismissed with costs.

Davies, J.

DAVIES, J., concurred with DUFF, J.

Idington, J.

IDINGTON, J.:—This somewhat remarkable case seems to require before dealing with the contentions made by appellant a concise, but full and accurate statement of the facts upon which they are founded.

One Carrothers on March 18 or 19, 1912, listed for sale two lots in Regina, Sask., with respondents, who were real estate agents in that city. The usual index-card specifying the lots to be offered and the price and terms he was willing to accept was signed by him. On the said March 19, appellant (formerly in the real estate business) called at respondents' office and offered a listing of other properties for which he wanted a purchaser and, whilst so there, was offered the Carrothers properties and verbally accepted the proposal and made a deposit of $100 on account of the purchase.

Next day respondent Tinck waited upon the appellant at his office to procure his signature to the agreement for the purchase by him of the said Carrothers properties and he signed same in duplicate and gave his cheque for the balance of the cash payment.

That agreement was not signed by any one for Carrothers as respondents never pretended to have authority to sign such an agreement and had only been retained to find a purchaser. They sent this agreement to Carrothers, in care of King Edward Hotel, Toronto, Ont., where he had said he was going, to be executed by him and returned.

The agreement was returned about a month later as uncalled-for. Thereupon the agreement was forwarded by respondents to Carrothers, at Edmonton, Alta., where he lived, but it never came back and, presumably, never was executed by him.

Some correspondence is alleged to have taken place later between him and respondents but that, though tendered in evidence by them, was rejected.

All we have of it is a copy of the letter from respondents enclosing the agreement from which it appears they asked him to sign and return one copy so duly executed attached to a bank sight-draft for the sum of $450, being the cash payment less respondents' commission.

On June 1, appellant says he called upon the respondents for a receipt for the money he had paid and got the following:—

March 20th, 1912.

Received of George S. Peacock $500, first payment on lots 1 and 2, block 108, Old City, bought from us at $1,000; one-half cash and the balance 6 and 12 months at 8 per cent. and listed by A. F. Carrothers.

(Sgd.) DAD LAND COMPANY,
R. TINCS.

The appellant meantime, in March 28, re-sold the property to Wright and Boyle, real estate agents, and, pursuant thereto, he and they signed an agreement for the sale and purchase thereof at the price of $2,000, of which $767 was to be paid in cash and balance spread over two years bearing interest at eight per cent. per annum.

They re-sold to one Seller at the price of $2,500 and assigned the said contract to him by an assignment which is not amongst the documents before this Court. A recital in the later agreement of August, hereafter referred to, indicates the assignment was executed on April 1.

On June 3 appellant concluded he could not get title to the property and "immediately took steps to re-purchase the property" from William Seller and succeeded in doing so at the price of $3,100. The exact date of that purchase is not given in evidence. And Seller was not called as a witness.

On June 4 respondents wrote appellant explaining that they had failed to get delivery of the lots and, to repay the cash payment, enclosed a cheque for $500, which was returned by appellant on July 30.

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Meantime some meetings of the parties hereto were held relative to the matter and, on one occasion, Boyle and Seller were both present to state what they had done, but the respondents on every occasion repudiated liability for damages appellant was then and there claiming from them. On one of these occasions respondents offered to give the cash if any doubt existed about the cheque being, as such, satisfactory, but appellant refused and seems to have insisted on these occasions on damages for the loss of profits and those differences in price which he said he had paid these sub-purchasers which seemed, in his view, to be his measure of damages.

On one or more of these occasions the appellant stated his grievances in the matter, omitting, however, the one most essential part of his story to which I am about to refer.

On August 5, an agreement was made in writing between Wright and Boyle of the first part, Seller of the second part and appellant of the third part, for rescinding and releasing said sub-sale and amongst other recitals therein was the following:—

And whereas it has been discovered by all the parties hereto that the party of the third part did not have the right to call for a title to the said lots nor any contract with the registered owner thereof and is unable to furnish any title nor will he be able to furnish any title to said lots, and it has been deemed expedient by all the parties hereto that, instead of the said respective purchasers under the said agreement and assignment insisting upon title being given according to the terms of said agreement and assignment, that the said agreement and assignment should be abandoned, and the moneys paid thereunder returned and the parties thereto compensated for their loss as hereinafter set forth.

The appellant says that when Tinck came to him with the agreement of sale by Carrothers and before he (the appellant) signed as above set forth the following conversation took place:—

Q. Now just state slowly what the conversation was? A. As soon as I saw the name of the vendor was A. F. Carrothers, I asked the defendant Tinck if he was sure that these lots could be delivered by Carrothers. He assured me that they could. I asked him if he had searched the title of these lots. He told me that the defendant Wilkinson had searched the title and that Carrothers was registered owner. I then referred to the matter that I knew that Carrothers had been in business here, and I wanted to know if there had been any execution against him. I understood that he had been in business difficulties. And he stated positively that there were no executions against him; the title was clear. He also said, "If you want any further protection in the matter we will have a caveat put on these lots for you."

In regard to this statement he is corroborated by his bookkeeper, Blenkhorn, to whose remarkable memory I may advert to later. Meantime I assume, for argument's sake, the truth of appellant's story and will, therefore, consider in light first thereof, standing alone, what (if any) claim appellant can found thereupon and next how in light of his own conduct he can make any claim.

Counsel for appellant puts his claim in a variety of ways. One of these is put in a two-fold sort of way of an assurance that the respondents undertook to sell the property or that it would be sold and delivered to the appellant so that he would have the title conveyed to him.

In either of these ways of presenting the matter it simply, when stripped of needless verbiage, means a contract of sale by respondents and the facts do not bear out any such contention. The respondents never professed to sell the property in any other capacity than as agents. The documentary evidence seems conclusive in this regard.

Then it seems to have been presented below as, in fact, an agent professing to sell and selling property he had no authority to sell. Again the facts are against appellant for the agents had authority to procure a purchaser and never signed any contract of sale. Their principal never signed any either. There cannot be found anything upon which an action for breach of warranty as agents can lie.

Indeed, it is difficult to grasp any of these elusive theories put forward and apply them in light of the evidence to any principle of law that would found an action for breach of contract. The suggestion is also made of a collateral warranty, but that must fail also as there was no contract to which it could be collateral.

The fifth and only ground which can be made to wear a plausible appearance in law is stated in the factum as follows:—

5. Alternatively to all the foregoing grounds because, by reason of the false and fraudulent statements of defendants, the plaintiff was led into and suffered damage.

The general statements as to producing title are of no material consequence for they are nothing more than any real estate agent might properly use affirming his belief in his client being ready to perform that which he had authorized to be done on his behalf.

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No action can lie for any such thing so long as the agent confines himself to what he has been authorized to carry out and has no reason to believe the principal is acting dishonestly.

The only serious matter, in what appellant states he was told by Tinck, is that relative to Wilkinson having searched the title and found Carrothers to be the registered owner and that there were no executions against him. Tinck positively denies these allegations and Wilkinson says he had never till August searched the title. And it puzzles me to understand how or why any sane man should tell such a senseless falsehood liable to be discovered at any moment at an expense of twenty-five cents for a search.

But appellant says more; that the man telling him offered to protect him further by filing a caveat. And apparently that very every-day proposal in such cases led to the discovery, as it was sure to do, that Carrothers never was registered owner.

He did not file any caveat, but appellant did at an expense, he says, of five dollars, on April 10. The caveat is produced and therewith the affidavit of appellant sworn on April 4, just fifteen days after he had been told, if a word of truth in his story, that Wilkinson, the respondent, had searched and found Carrothers to be the registered owner. The caveat consists of a notice to the registrar of which the part essential to our present inquiry is as follows:—

> Take notice, that I, George S. Peacock, of Regina, in the Province of Saskatchewan, claiming an equitable interest under and by virtue of an agreement of sale between A. F. Carrothers, of the City of Edmonton, as vendor, and myself, George S. Peacock, of the City of Regina, in the Province of Saskatchewan, as purchaser, and dated on or about the 20th day of March, 1912, the said Carrothers holding the said land under and by virtue of an agreement of sale therefor made with Arthur Tyzack, the registered owner, in all that certain piece or parcel of land being lots numbers one, . . . , etc.

describing the lands in question.

The appellant as such caveator, verifying said statement, swears amongst other things, as follows:—

> 1. That the allegations in the above named caveat are true in substance, and, in fact, to the best of my knowledge, information and belief.

And this man, thus swearing, is asking damages from a Court of justice for having been fraudulently induced by the state-

ment that the said registered owner was Carrothers. Need I say that in law, unless in fact a false statement induces a man to act upon it to his damage, he has no right of action; and that unless he has taken the means a prudent man would be expected to take when so acting upon a false statement, he has no action of deceit.

Can any one, in face of such an unfounded affidavit by appellant, so inconsistent with the story of a belief in Carrothers being registered owner, believe he, appellant, was so induced by the alleged fraudulent statement?

But that is not all, for Wilkinson was called as a witness and testified as to what transpired at one of the meetings I have referred to above as follows:—

Q. Then do you remember any other important conversations that you had with him? A. I remember him coming to the office on Cornwall street and bringing two gentlemen with him, Mr. Boyle and another gentleman. Q. Your office was on Cornwall street? A. Yes. Q. And you had a conversation at that time? A. Yes. Q. There was Mr. Peacock and Mr. Boyle, and this other gentleman and yourself? A. Mr. Tinck was there also. Q. And what took place at that time A. Mr. Peacock made a demand for compensation for some loss that he alleged he had sustained. Q. And did you agree to give him compensation? A. We did not. Q. Did he at that time charge that you had told him that you would search the title to this property? A. He did not. Q. Did he say in the presence of Mr. Boyle or Mr. Tinck or anybody else that you had guaranteed to deliver this property to him? A. He did not.

Appellant nowhere states that he had ever made it a matter of reproach to these respondents, or either of them, when claiming damages that he had been told such a palpable falsehood as he now charges against Tinck, and founds this action upon. If he had been told what he says and trusted it, then was the time respondents and others should and doubtless would have heard of it.

Wilkinson swears he never searched till August (and he could easily have been contradicted if he had or could have been proven to have known or been told of this discovery), yet no one appears to say so except what appellant says, and then only inferentially.

Appellant was recalled after Wilkinson had testified as above, but did not venture to contradict his very material statement.

How could a man misled by such a story as he now puts

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forward forbear from charging him or his partner or both with the alleged deception he now relies upon?

No one ever seems to have heard of it except Blenkhorn.

When, on cross-examination, appellant was brought face to face with the said caveat, he speaks thus:—

Q. Mr. Peacock, at the time you signed the caveat did you know whether Carrothers had bought this property under any agreement of sale from anybody? At the time you signed the caveat you knew that the property was not registered in the name of Carrothers? A. I did. Q. Did you have any information that Carrothers had bought from any particular person? A. After I signed that caveat I called up the defendant Wilkinson—— Q. Never mind after you signed the caveat. At the time you signed the caveat did you know whether Carrothers had bought from anybody—how he held the title? A. No; I did not.

Later he tries an explanation that does not in the least degree ameliorate his position, but seems to indicate that his solicitors had some telephone conversation with Wilkinson, after their discovery that Carrothers was not the registered owner, in which he alleges Wilkinson had remarked "well he must have it under agreement for sale," all of which is hearsay. But Wilkinson was recalled and testified thus:—

Q. Did you ever tell Mr. Peacock over the telephone or in any other way that Carrothers held this property under agreement of sale from Arthur Tyzack, the registered owner? A. No, sir. I wasn't aware that Mr. Tyzack owned the property or was the registered owner.

And was allowed to go without cross-examination or any contradiction from those in the solicitor's office.

Blenkhorn, the corroborator of the appellant, in cross-examination, testifies as follows:—

Q. Have you discussed your evidence with anybody? A. I have mentioned the matter? Q. Have you talked it over with Mr. Peacock? A. Well, very little. Q. Have you not gone over your story together? A. Never gone over my story. Q. And never gone over it with my learned friend? A. No.

The improbability of this adds nothing to the strength of his story or to inspire confidence in his corroboration. Indeed, in one of appellant's answers he says, after being positive, as follows:—

A. When he stated the title was clear of incumbrance and in the name of A. F. Carrothers, I understood him to say that Wilkinson had searched the title.

On the foregoing no Court should allow any damages for

fraud, even if suffered, when so clearly not relied on, and reliance thereon only supported by the oath of a man who could deliberately take the oath above set forth so inconsistent with his having relied upon the pretended assurance.

Even if the case had been something better than it is there never was, in law, any ground for damages by reason of the re-sale and that being re-assigned. Appellant could not have been called upon for damages flowing from the failure to make title to Boyle and Wright unless he was deliberately trying to defraud these other gentlemen. Nor in that case could he look to any one else to reimburse him. And the recital above quoted from the agreement of August with said sub-purchasers indicates no such ground was ever taken.

The case of *Bain* v. *Fothergill*, L.R. 7 H.L. 158, within which all such like claims as herein involved fall, is yet good English law as introduced into the North-West. I respectfully submit the case of *O'Neill* v. *Drinkle*, 1 Sask. L.R. 402, cannot be considered as governing such claims. There are many conceivable cases arising out of land sales in which damages may be recovered, but wherein they fall within *Bain* v. *Fothergill*, L.R. 7 H.L. 158, the claim must fail. Because of simplifying or simplicity of tenure a change in the law governing such cases cannot be presumed to have taken place. On such a ground the various provinces might have different laws, and, in Ontario, for example, one law for the lands held under the old registry system and another for titles under the new system.

Within the said case, short of fraud, respondents if assumed in the position of vendors, as in one way the case is presented, would not be liable, as no fraud is found. And there is no case on which appellant under the circumstances can succeed in treating the action as one of deceit. I think this appeal should be dismissed with costs.

DUFF, J.:—The learned trial Judge took one view of the facts and the Court of Appeal took another view. And it appears to me that the crucial question on the appeal is whether or not the full Court was right in rejecting the conclusion upon the facts that the trial Judge had arrived at.

It is important in appreciating the conduct of the parties

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to keep in mind the fact that at the time when the transactions and events occurred which have to be considered there was great activity in the buying and selling of real estate in Regina, or in other words, that a "land boom" was in progress.

The plaintiffs' claim in the pleadings was based alternatively, first, upon an allegation that the defendants had undertaken to procure the transfer of a good title to the lots in question to the appellant; and, upon an alleged fraudulent misrepresentation that Carrothers was the registered owner of the lots. The trial Judge decided in favour of the appellant upon the first of these two alternative grounds. The full Court reversed the judgment of the trial Judge holding that what was done by the defendants was in the ordinary course of their business of finding a purchaser for Carrothers, and that they entered into no agreement either to procure a sale from Carrothers to the appellant or as agent on behalf of Carrothers to sell.

The claim based upon deceit was not, as I think, either in substance or in form passed upon by the learned trial Judge. The full Court appears to have rejected this claim upon the ground that certain misrepresentations of fact were not shewn to be fraudulent, and that the plaintiff's loss was not due to the respondents' misrepresentations, but to his own recklessness in entering into a binding agreement for the sale of the lots before he had procured a concluded agreement with Carrothers for the purchase of them.

The points in dispute are questions of fact, but the right determination of these questions depends almost entirely upon the proper inference to be drawn from facts which, in themselves, can hardly be said to be the subject of controversy. My opinion, after a full examination of the evidence is that the judgment of the full Court was right.

One point ought to be noted at the outset and that is that the mere listing of property, as it is called, with a real estate agent does not itself involve the grant of any authority to him to enter into a binding contract of sale on behalf of the vendor. Where sales are made in the course of a "land boom" it perhaps most frequently happens that the seller who lists his property with the real estate agent has a title resting upon one or more,

sometimes upon a long series of executory agreements and it is of the greatest importance that the conditions of any contract of sale should be so drawn as to protect him fully, and this, without special instructions, the agent is, of course, not competent to do. Some confusion, no doubt, has arisen from the use of the term "real estate agent" which describes, of course, not the legal relation between the two parties, but merely the nature of the so-called agent's occupation. The mere listing of property with such an agent implies nothing more than a representation that the proprietor is prepared to do business upon those terms and is not in itself an offer to sell which may be accepted and converted into a binding agreement by any purchaser saying to the agent that he will take the property on those terms. The agent's business is to procure a purchaser, that is to say, to bring into contact with the vendor a person willing to purchase on the terms mentioned. Having done that he has performed his function and earned his commission, provided his authority is not in the meantime revoked by the sale of the property by the proprietor. The listing alone gives him no authority to bind the proprietor by a contract of sale. The fact which seems to me to be sufficiently established that the defendants did not profess to sell the lots is, in my judgment, the decisive fact in the case. I think that fact is established as a necessary inference, from other facts which are not seriously in dispute. I have already mentioned that the contract signed by the appellant professing to record the transaction formally into which they intended to enter was a proposed contract between himself and Carrothers which he quite well understood was to be executed by Carrothers and not by the defendants as Carrothers' agent. That document must be taken as conclusive evidence of the character of the transaction in respect of which the sum of $400 was paid on that day to the respondents. The contemplated transaction was a contract of sale which was to be completed only when executed by both parties to it. It seems idle, in face of that, to suggest that on the day before an oral agreement of sale had been entered into between the appellant as vendee and the respondents representing Carrothers as the vendor. Any such suggestion, moreover, comes to shipwreck on the hard

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fact that the terms of listing made known to the appellant required the payment of $500 in cash, that is to say, contemporaneously with the constituting of the relation of vendor and purchaser between the proposed parties to the agreement.

The fact was known to both parties that the agent had no authority to conclude a contract of sale upon any such terms, that is to say, in the absence of such a payment. As no contract of sale was ever entered into professedly by the respondents on behalf of Carrothers it follows that the representations of authority to enter into such an agreement upon the terms mentioned, assuming there were such representations, the authority not having been acted upon, could not give rise to any right of action. It follows also that any right of action *ex contractû* against the respondents must rest upon some contractual undertaking on their part that Carrothers would execute the agreement signed by the appellant.

The most important evidence in support of this branch of the appellant's case is in his statement made on cross-examination that he was told by the defendant Tinck that he could "rely on getting delivery of the property." It is necessary, however, to read this testimony with the plaintiff's statement that at the same time he was assured that Carrothers had the title and with the statement in his examination-in-chief to the effect that the assurance given by the defendant was a positive assurance that Carrothers could deliver the property. I do not think this evidence is sufficient to establish the existence of an agreement to procure the execution of a contract of sale by Carrothers. The point about which the appellant was concerned, as I think the evidence sufficiently shews, was the question of Carrothers' title. It was to this point that the appellant's questions and respondents' assurances were addressed.

The appellant admits that he is unable to assert that he at any time believed the respondents to be selling the property on their own behalf. Read as a whole the evidence appears to be too doubtful and equivocal to justify a conclusion in the sense contended for by Mr. Frame. It is not a matter in which the conclusion of the trial Judge is entitled to that weight which attaches to his opinion on any point of credibility.

I think the conclusion of the full Court is to be preferred.

There remains the question of fraud. This ground of action also obviously fails, I should have thought, once it is plain that the appellant had not a concluded contract with Carrothers for the sale and purchase of the lots; and for this short reason, that, having no contract with Carrothers, the question as to whether Carrothers had or had not a title to the land, whether he was or was not the registered owner, must necessarily have been a matter of no moment. If every representation of fact made by the respondents had been perfectly true the appellant would, in the absence of such a contract, have been in precisely the same position as he found himself in in June, unable to make a title so far as it appears from the evidence.

It seems to have been assumed that the respondents' failure to procure Carrothers to transfer the property to the appellant was due to Carrothers' want of title, or rather to his lack of any right to call for such transfer. All that is mere speculation. If anything the probabilities are against it. Carrothers admittedly was not the registered owner; but that is entirely consistent with the existence in him of a right to call for a transfer of the property to his nominee.

On the other hand there is the fact that the property was unquestionably listed by Carrothers with the respondents, who, as it appears from the correspondence, entertained no doubt whatever as to Carrothers' power to deal with it. The simple explanation as to Carrothers' refusal to sign the agreement most probably lies in the fact that when the documents reached him he had learned that the property in the meantime had doubled in value. Knowledge of this sudden rise may also explain the haste of the appellant to enter into a contract of sale without having first ascertained that he was in a position safely to enter into such a contract.

Looking at the transaction broadly, one sees no reason to doubt that it was simply a case of an owner, having listed property, refusing to stand by the terms he had given to his agent, and an intending purchaser acting upon the agent's assurances that the principal would stand by them without satisfying himself by proper inquiries whether, in point of fact, he had any

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contract at all with the owner of the property and suffering loss in consequence of his rashness. That in this case the assurances of the agents were understood to be contractual in their nature is not asserted in his evidence by the appellant himself; and as such assurances—that the principal would accept and execute the proposed contract of sale—being assurances as to something which necessarily was a matter of opinion only, the appellant can only found an action upon them by obtaining a finding that they were fraudulent. The learned trial Judge has not found as regards these assurances that they were fraudulent. The full Court has found that they were not. An independent examination of the record satisfies me that there is no evidence upon which any finding that they were could be properly based.

For these reasons I think the appeal should be dismissed with costs.

ANGLIN, J.:—I concur with Mr. Justice Duff.

*Appeal dismissed with costs.*

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## CANADIAN BANK OF COMMERCE v. WALDNER.

*Saskatchewan Supreme Court, Haultain, C.J., Lamont, Brown, Elwood and McKay, JJ. March 20, 1915.*

1. BANKS (§ IV A 2—51)—TITLE TO NOTES DEPOSITED AS COLLATERAL—ACCRUAL OF INDEBTEDNESS—APPLICATION.

A bank becomes a holder for value of notes deposited with it by its customer as collateral to the latter's promissory note not then due, as soon as the customer's indebtedness to the bank matures or at the time when such indebtedness was increased during the currency of the promissory note in question, particularly where the bank held a general letter of hypothecation in respect of all notes, bills and securities lodged with the bank in connection with the customer's account.

[*Merchants' Bank* v. *Thompson*, 3 D.L.R. 577, referred to.]

Statement

APPEAL by defendants from a judgment of the trial Judge in an action on two promissory notes.

*P. H. Gordon*, for appellant.

*Frame, Secord & Co.*, for respondent.

The judgment of the Court was delivered by

Elwood, J.

ELWOOD, J.:—This is an action brought by the plaintiff as holder of two promissory notes made by the defendant in favour of W. C. Kidd & Co., and which were endorsed by the said Kidd

& Co. to the plaintiff. The statement of defence *inter alia* alleges that the notes were not assigned to the plaintiff in due course; that the notes were given for the purchase-price of a stallion sold by the said Kidd & Co. to the defendant subject to certain warranties and guarantees, and there was no consideration for the note. The whole argument turned upon the question of whether or not the plaintiff was a holder for value. Briefly, the circumstances under which the plaintiff received the note in question from Kidd & Co. were as follows: At the time of the receipt of the note, Kidd & Co. were indebted to the plaintiff under a promissory note not then due. Kidd & Co. deposited the notes in question with the plaintiff as collateral to their promissory note to the plaintiff some time after that note was given. At the time of this deposit, and as far as the evidence goes, up to the time of the action, the plaintiff had in its possession from Kidd & Co. a general letter of hypothecation which *inter alia* contained the following:—

> All bills, notes, agreements for payment of money, promises to pay money, debts, accounts, claims, choses in action, and other securities (hereinafter called securities) heretofore or hereafter lodged in connection with the account of the undersigned with the bank or assigned to the bank, have been and shall be so lodged, assigned and held by the bank upon the terms and for the purposes following, *viz.*:—
>
> The said securities, and any renewals thereof and substitutions therefor and proceeds thereof are to be held by the bank as a general and continuing collateral security for payment of the present and future indebtedness and liability of the undersigned, and any ultimate unpaid balance thereof, and the same may be realized by the bank in such manner as may seem to it advisable, and without notice to the undersigned in the event of any default of such payment. The said proceeds may be held in lieu of what is realized, and may as and when the bank thinks fit be appropriated on account of such parts of said indebtedness and liability as to the bank seems best.

Prior to either of the notes sued on herein becoming due, the indebtedness of Kidd & Co. to the plaintiff had matured and had been increased by a sum largely in excess of the amount of the notes sued on herein. This indebtedness kept increasing from time to time up to and until after the second of the notes sued on herein matured. The evidence at the trial shewed that the plaintiff had no knowledge of any defect in the notes sued on herein. It was contended on behalf of the defendant, on the

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authority of *Canadian Bank of Commerce* v. *Waite*, 1 Alta. L.R. 68; *Bank of B.N.A.* v. *McComb*, 21 Man. L.R. 58, and *Merchants' Bank of Canada* v. *Williams*, 6 W.W.R. 563, that the plaintiff was not a holder for value. In the first two of the above cases it would appear that at the time of the deposit of the notes sued on, the only indebtedness owing by the person so depositing the notes to the bank was an indebtedness accruing due but not due, and that before that indebtedness became due the bank in each case had notice of a defect in the notes; and it was held that the bank were not the holders for value without notice. The report of *Merchants' Bank* v. *Williams* is not very full as to the facts, but I take it that the facts were exactly the same as in the above other two cases. Without expressing any opinion as to the correctness of the decisions in those cases, they seem to me to be quite distinguishable from the present in that in the present case, before either of the notes sued on became due, and without any notice of any defect, the indebtedness of Kidd & Co. to the plaintiff matured and was increased. It will be observed that the effect of the letter of hypothecation above-mentioned was to give the bank a lien upon the notes sued on herein, and I am of the opinion that as soon as the indebtedness of Kidd & Co. to the plaintiff matured, and at any rate after it became increased, the plaintiff became a holder for value. There was a consideration for the retention by the plaintiff of the notes sued on. This view seems to be taken by Perdue, J.A., in *Bank of B.N.A.* v. *McComb* (above), where he says:—

> There is some evidence that when Bartlett's note fell due on the 13th June the plaintiffs exercised forbearance by accepting a renewal on the strength of the collateral security in the shape of the note in question. This might make the plaintiffs holders in course on the last-mentioned date if they had no notice at that time of the invalidity of the note.

In *Merchants' Bank* v. *Thompson*, 3 D.L.R. 577, 3 O.W.N. 1014, the Chief Justice of Ontario is reported as follows:—

> As endorsees for collection of the note, they were entitled to a lien on it for debts that were then presently payable and from time to time thereafter becoming payable. The claim now made is in respect of an indebtedness of Fox which became payable from and after the 24th April, 1908. Prior to that date there was a period in which Fox was free from direct indebtedness, although there were some outstanding notes or drafts under discount, a time during which, according to the plaintiff's manager, Fox was at liberty to take the note out of the plaintiff's possession had he

chosen. But Fox did not take it away, and it remained with the plaintiffs until the debts now due and payable had accrued, and unless something had occurred between Fox and Living prior to the 24th of November which furnished the latter with a defence to an action on the note, the plaintiffs are entitled as holders to a lien for the amount of Fox's indebtedness to them.

The case of *Re European Bank*, L.R. 8 Ch., at p. 41, is authority for the proposition that the bank would have a lien, apart entirely from the letter of hypothecation, and the case of *Gray* v. *Seckham*, L.R. 7 Ch. 680, seems to me authority for the proposition that the bank in this case are holders for value of the note. In my opinion, therefore, the appeal should be dismissed with costs.

*Appeal dismissed.*

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## POWELL v. MONTGOMERY.



*Saskatchewan Supreme Court, Haultain, C.J., Newlands, Brown, and Elwood, JJ. July 15, 1915.*

1. BROKERS (§ II B 1—12)—REAL ESTATE BROKERS—COMPENSATION TO —SUFFICIENCY OF SERVICE—CANCELLED SALES.

A stipulation in an agreement authorizing an agent to retain the commissions owing and due him of each sale out of the instalments collected from the purchaser, but that he was to collect the various instalments without further charge, entitles the agent to his full commissions on each sale approved by the principal, notwithstanding its subsequent cancellation in consequence of the default of the purchaser in the payment of instalments.

2. COSTS (§ I—2*d*)—RIGHT TO—PLEA OF SET-OFF.

Costs may be properly allowed to a defendant who succeeds on the plea of set-off.

Statement

APPEAL from the judgment for defendant.

*N. Craig*, for appellant.

*W. Mills*, for respondents.

The judgment of the Court was delivered by

Brown, J.

BROWN, J.:—On June 13, 1912, the plaintiffs, being the owners of certain subdivision property known as the Rothesay Park Addition to the City of Moose Jaw, entered into an agreement with the defendants whereby the defendants became the agents of the plaintiffs for the sale of this property. There is a schedule (A), to the agreement which sets out the selling price and the terms of sale. There is a further schedule (B), which sets out a lower price. The agreement *inter alia* contains the following stipulations:—

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5. No sale of any of the lands hereinbefore described or any part thereof shall be made at any other than the prices fixed and laid down and upon the terms set out in schedule "A" to this agreement, but the said parties of the second part (the defendants) shall only be bound to account to the said parties of the first part (the plaintiffs) for the sale of the said lots at the prices and on the terms set out in schedule "B" hereto, and the said parties of the second part shall be entitled to retain the difference between prices set out in schedule "A" and the prices set out in schedule "B" as and for commission and remuneration of them, the said parties of the second part, said remuneration to cover all collections of instalments maturing from time to time on sales made by the said parties of the second part or their agents, provided that the said parties of the second part shall be entitled to retain the amount so owing to them for remuneration on each sale as aforesaid, by retaining one-half of the cash payment and one-half of each succeeding instalment until the total amount of remuneration due them on each sale has been received by the said parties of the second part.

6. It is hereby agreed that the parties of the second part are agents to find purchasers only, and shall not have the power to make binding agreements, and that they shall further collect instalments as agents for the parties of the first part, but are not to charge commission on such collections.

The defendants from time to time sold lots and collected money on such sales under this agreement, and this action is brought to compel the defendants to account for money so collected. The defendants admit having collected the money, and claim as a justification for withholding payment that the plaintiffs owe them an equal amount by way of commission on sales of land made by them as agents of the plaintiffs. This claim for commission arises in connection with the sale of a number of lots on which the first or cash instalment only was paid. The purchasers having made default in connection with the subsequent instalments, the plaintiffs served notices of cancellation of their contracts, and the defendants were instructed not to accept any further payment from such defaulting purchasers.

The law as applicable to the case is set out in 1 Hals., p. 194, as follows:—

413. In order to entitle the agent to receive his remuneration, he must have carried out that which he bargained to do, or at any rate must have substantially done so, and all conditions imposed by the contract must have been fulfilled. He is not, however, deprived of his right to remuneration, where he has done all he undertook to do, by the fact that the transaction is not beneficial to the principal, or that it has subsequently fallen through, whether by some act or default of the principal, or otherwise, unless there is a provision of the contract, express or implied, to that effect, or unless the agent was himself the cause of his services being abortive.

The defendants here substantially carried out what they bargained to do. They effected sales which were approved of by the plaintiffs, and in doing so, they thereby earned the commission. This seems clear from the agreement, in that it refers to the commission as *owing*, and again as *due*, the defendants on each sale made. It is true that the defendants were to collect the various instalments from the purchasers without further charge, but it can scarcely be urged that the commission was not earned until these collections were made in view of the fact that under the terms of the agreement there is the provision that the defendants are "not to charge commission on such collections," and moreover, there would be outstanding instalments still to be collected after sufficient had been received to pay the commission. Nor can the contention of counsel for the plaintiff be given effect to, that payment of the commission by the plaintiffs is dependent upon the purchasers making payment of their instalments. The agreement provides that the defendants shall be entitled to retain the commission owing and due them on each sale out of the instalments collected from the purchaser, but that does not necessarily mean that the payment of their commission is to be dependent upon payments by the purchaser. The agreement provides that each contract of sale must be approved of and signed by the plaintiffs. That provision was not for the purpose of protecting the plaintiffs in the terms of sale, as the prices and terms are fully set out in schedule (A) and the form of contract is, under the agreement, to be supplied by the plaintiffs themselves. Their approval must, it seems to me, have special reference to the character of the proposed purchaser and the value of his covenant to pay. In my opinion the agreement as a whole contemplates that the plaintiffs shall take full responsibility for the failure of the accepted purchaser to pay, and that the defendants are entitled to their commission irrespective of whether such purchaser carries out the terms of his contract or not. It is quite clear that it was no fault of the defendants that their services proved somewhat abortive, and it does not appear to me to be material to the case as to whether the fault is to be laid to the plaintiffs or to the purchaser. Counsel for the plaintiffs relied on the authority of *Beale* v. *Bond*, 17 T.L.R. 280. A perusal of that case shows it to be clearly distinguishable.

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There the terms under which the commission agent acted were as follows:—

I agree to accept a sum of £1,150 for the above property, and you are to be at liberty to receive anything over and above that as a commission, it being understood that I am to receive the full sum of £1,150 without deduction, except, of course, apportionments of outgoings.

And the Master of the Rolls, in giving judgment, says:—

The question in this case was as to the meaning of the contract contained in what was called the commission note. It seemed to him to be a very special contract. The plaintiff desired to employ the defendant to find him a purchaser for two leasehold houses. The plaintiff, of course, intended that the defendant should be paid for his services. But how was he to be paid? The plaintiff in effect said this, that he would not pay anything as actual commission, but if the defendant obtained £1,150 clear for the plaintiff, then anything over that the defendant might obtain he might put into his own pocket.

The defendants set up their claim by way of defence or set-off. It was objected at the trial that their remedy was by way of counterclaim. The learned trial Judge thereupon treated the pleadings as if a counterclaim had been set up, and gave judgment for the plaintiffs on the claim with costs, and for the defendants on the counterclaim with costs of the counterclaim. It was objected before us that the defendants under the circumstances should not have been given their costs of the counterclaim. I am of opinion that the defendants had the right to plead and properly pleaded their claim by way of defence or set-off, and that therefore they were entitled to the costs of the action. Annual Practice (1915), pp. 377 *et seq.*; *Waterous Engine Works Co.* v. *Ball*, 7 Terr. L.R., 32. The plaintiffs, therefore, have no cause for complaint, and as the defendants have not raised any objection to the disposition of the costs, I am of opinion that the judgment in this respect should stand. In the result the appeal should be dismissed, with costs.

*Appeal dismissed.*

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## ROYAL BANK OF CANADA v. LEE & GIRARD.

*Supreme Court of Saskatchewan, Haultain, C.J. January* 18, 1915.

1. APPEAL (§ XI—720)—GRANTING LEAVE TO—ORDERS OF DISTRICT COURT.

Where no special leave has been granted an order made by a district court judge as *persona designata* under the Creditors' Relief Act, R.S.S. ch. 63, is not subject to appeal.

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2. MOTIONS AND ORDERS (§ II—7)—ORDER UNDER CREDITORS' RELIEF ACT—IRREGULARITIES—AMENDMENT.

Where an order made by a district court judge was not entituled in the matter of the Creditors' Relief Act, but it was plain from the nature of the order that it was made under that Act, such judge has power under sec. 16 to amend the order to include the omitted words and generally to cure irregularities and defects in his prior order.

3. MOTIONS AND ORDERS (§ II—8)—IRREGULARITY OF JUDGE'S SIGNATURE—VALIDITY.

Where an application to a district court judge was clearly made under sec. 8 of the Creditors' Relief Act, R.S.S. ch. 63, but by inadvertence the judge signed the order over the designation of local master (L.M.) the latter may be treated as surplusage and will not affect the validity of the order.

Statement

APPEAL from an order of the Local Master at Saskatoon.

*P. H. Gordon*, for the appellant.

*P. E. Mackenzie*, K.C., for the respondent.

Haultain, C.J.

HAULTAIN, C.J.:—A certain amount was paid into Court to the credit of the cause in the case of J. E. Girard, plaintiff, and Boucher and Tournier, defendants, and Commercial Union Insurance Co. *et al.* garnishees. Certain claims upon this money were made, and on November 6, 1914, the Local Master at Saskatoon adjudicated upon these claims, and by his order of that date ordered one of the claims to be paid, barred another claim, and ordered that the balance of the money in Court, after payment of the claim allowed, should be paid out to the solicitors of the plaintiff Girard. On the same day the sheriff served a notice on the local registrar at Saskatoon claiming payment to him of a sufficient amount of any money in Court belonging to Girard to satisfy the execution of the Royal Bank, the plaintiffs in the present action, against the defendant Girard. On November 9, an order was made under sec. 8 of The Creditors' Relief Act, ch. 63, R.S.S., by which it was ordered that a sufficient amount of "the moneys standing in Court to the credit of Joseph E. Girard" should be paid out to the sheriff to satisfy the above-mentioned execution. This order was made *ex parte*. The defendant appealed from this order to a Judge in Chambers, and my brother Brown dismissed the appeal on the ground that as the order was made *ex parte* an application should have been made to the Judge who granted the order for a re-hearing. The order of November 9 was not styled, "In the matter of The Creditors' Relief Act", and underneath the signature of the Judge the initials "L.M." appear. The plaintiffs served notice

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of motion to rectify this order by adding to the title the words "In the matter of The Creditors' Relief Act", and by striking out the words "Local Master" and substituting "District Court Judge." On the hearing of this application similar objections were taken on behalf of the defendant Girard to the granting of the order as were taken on the appeal which was heard by my brother Brown. The learned District Court Judge, however, by order of December 3, rectified the order as requested. The defendant Girard now appeals from that order.

I do not think that the intitials "L.M." in the order of November 9, made any material difference. The application was clearly made under sec. 8 of The Creditors' Relief Act, and the fact that the learned District Court Judge signed the order over the initials "L.M." instead of "J.D.C.", evidently through inadvertence, should not, in my opinion, affect the validity of the order. The order was made by the proper person, and the initials may be treated as surplusage.

These proceedings should undoubtedly have been styled, "In the matter of The Creditors' Relief Act", but it is quite plain from the nature of the order that it was made under the provisions of that Act, and I think that the Judge had ample power, under sec. 16 of the Act, to cure irregularities and defects. The position created by the two orders of November 6 and 9, is somewhat peculiar. On November 6, Judge McLorg, as Local Master, ordered the balance of the money in Court in the cause of *Girard* v. *Boucher*, to be paid out to Girard's solicitors. On November 9, while this order was still in full force, as *persona designata* under The Creditors' Relief Act he ordered the same money, or part of it, to be paid out to the sheriff to satisfy the execution in the present action. His power to do this is at least open to question. It might also, in my opinion, be argued that on November 9, there was no money in Court "to the credit of Joseph E. Girard," in view of the fact that under the order of November 6, any money that might have belonged to Girard had been ordered to be paid out to his solicitors. These questions unfortunately, I think, cannot be dealt with here. Sec. 6 of An Act respecting Judges' Orders in Matters not in Court (ch. 55 R.S.S.) as amended by sec. 12 of ch. 67 of the statutes of 1913, provides that "there shall be no appeal from the order of a Judge

made by him as *persona designata* unless an appeal is expressly authorized by the Act giving the jurisdiction, or unless special leave is granted by the said Judge, or where such Judge is a Judge of a district court, by a Judge of the Supreme Court." An appeal is not authorized by The Creditors' Relief Act, and special leave to appeal has not been granted. See *Re Humberstone & City of Edmonton*, 14 W.L.R. 492. The notice of appeal ignores the fact that the order appealed from was made by the district court Judge "in the matter of The Creditors' Relief Act." The notice of motion to rectify the order of November 9, expressly stated that the application would be made to "the district court Judge as *persona designata* under The Creditors' Relief Act", and the order was made by him in that capacity. I was not asked, and I do not think I could have been asked, to grant the special leave to appeal *ex post facto*, in view of the position taken by the defendant. Both the appeal and cross-appeal must therefore be dismissed, but without costs.

*Appeal dismissed.*

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## ROYAL BANK OF CANADA v. LEE & GIRARD.



*Saskatchewan Supreme Court, Newlands, Brown, Elwood, and McKay, JJ. March 20, 1915.*

1. GARNISHMENT (§ II D—50)—PAYMENT INTO COURT—POWERS OF DISTRICT JUDGE—CREDITORS' RELIEF ACT.

Money paid into the Supreme Court under a garnishee summons and ordered to be paid out under the Rules of Court is not subject to the orders of a Judge of the District Court to pay the money to the sheriff under the Creditors' Relief Act (Sask.).

Statement

APPEAL from the order of HAULTAIN, C.J., *ante* p. 216.

*P. H. Gordon*, for appellant.

*McCraney, McKenzie & Co.*, for respondent.

Newlands, J.

The judgment of the Court was delivered by

NEWLANDS, J.:—In an action in the Supreme Court in which J. E. Girard was plaintiff and Wm. A. Boucher *et al.* defendants, money was paid into the Court under a garnishee summons, which moneys were afterwards ordered to be paid out by the Local Master. This order provided that, after the payment of certain claims, the balance be paid to the plaintiff's solicitors. An *ex parte* application was then made to his Honour Judge McLorg, the Judge of the District Court for the Judicial District

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of Saskatoon, who is also a Local Master of the Supreme Court, to pay the money to the sheriff under the Creditors' Relief Act. Some errors were made in the heading to the papers on which this application was made to him, but he made the order asked for. When the order was taken out it contained the letters L.M. after the signature of Judge McLorg, and on an application to him to amend, he struck them out and inserted the letters J.D.C., and he stated in his judgment that he made the order under the Creditors' Relief Act as a Judge of the District Court. From this order an appeal was taken to a Judge of the Supreme Court, and the Chief Justice dismissed the appeal on the ground that the order in question was made by the District Court Judge as *persona designata* under the Creditors' Relief Act, and there was no appeal from such order without leave and that no leave had been granted nor asked for.

From this order Girard, who is one of the defendants, has appealed to this Court. One of the grounds of appeal is that the order was made by Judge McLorg as Local Master and not as Judge of the District Court. Upon this ground the appellant must fail. The learned Judge himself says he made it as Judge of the District Court under the Creditors' Relief Act, and that the letters L.M. after his name were put there without his knowledge. This, in my opinion, disposes of the defendants' contention that he acted as Local Master, and with it falls the other grounds of appeal, which are based upon the fact that he made the order as Local Master.

The appea should therefore be dismissed. The Chief Justice dismissed the appeal to him without costs, and I am of the opinion that this appeal should be dealt with in the same way and for the following reasons. The order, upon which this appeal is based, was made by a Judge of the District Court as *persona designata* under the Creditors' Relief Act and presumably under sec. 8 of that Act. This section provides that, where there is a fund in any Court belonging to an execution debtor, the sheriff may, on application, have the money paid over to him. Because sub-section 2 of sec. 2 of that Act provides that "Judge" shall mean a Judge of the District Court, this application was made to such Judge. Now this section does not say that the application is to be made to a Judge, so that sub-sec. 2 of sec. 2 cannot apply.

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The application should therefore be made to the Court in which the money is, and in this case it would have to be made under the Rules of Court, as rule 508, sub-sec. 3, provides that no money paid into Court under these proceedings (*i.e.*, the garnishee proceedings under which this money was paid in) shall be paid out unless on the written consent of the parties interested, except by order of the Court or a Judge.

Newlands, J.

The money in question was paid into the Supreme Court under the Rules of Court. It was ordered to be paid out under those Rules and as there is nothing in sec. 8 of the Creditors' Relief Act that gives a Judge of the District Court power to interfere with such order, or with money to the credit of a cause in the Supreme Court, the order made by the District Court Judge is a nullity. That being the case the parties are where they were before these proceedings started and the matters in question were never properly before this Court. The appeal should therefore be dismissed, but without costs.

*Appeal dismissed.*

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## MAYTAG CO. Ltd. v. KOLB.

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*Saskatchewan Supreme Court, Newlands, Elwood, and McKay, JJ.*
*July 15, 1915.*

1. PRINCIPAL AND SURETY (§ I A—3)—JOINT SIGNING OF CONTRACT OF SALE—CONDITIONS AS TO PAYMENTS—JOINT LIABILITY.

A party who signs a contract for the sale of machinery as surety for but jointly with the purchaser thereby becomes a joint debtor and subjects himself to the stipulated liability for the prompt accrual of the whole contract price upon the failure to furnish notes and collateral security before the use of the machinery.

Statement

APPEAL from a judgment for plaintiff.

*H. J. Schull*, for appellant.

*F. L. Bastedo*, for respondent.

The judgment of the Court was delivered by

Newlands, J.

NEWLANDS, J.:—This is an action on an agreement in writing under seal to purchase certain machinery. The agreement is made between the plaintiff as vendor on the one part and Edwin Brubacher and the defendant as purchasers on the other part. The learned trial Judge gave judgment for the plaintiff company.

From this judgment the defendant appeals on the ground that he was not a purchaser but a surety for Edwin Brubacher, the other party to the contract, and that he was discharged, first: be-

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cause the machinery in question was not delivered to Edwin Brubacher, but to Brubacher Bros., and second: because the contract was to pay certain moneys and give certain promissory notes and that there was no evidence that the contract was not performed by payment and the giving of the promissory notes, but that the evidence points to the fact that it was so performed and that, therefore, the contract is discharged as to him.

Upon the question that the defendant was a surety only and not a principal, the trial Judge said: "Upon the defendant's own admission he signed as security for E. R. Brubacher."

In 15 Hals., 441, note (n), he says:—

> Where, however, a party becomes surety to another under an instrument which in terms creates only a joint liability, then, in the absence of any proof to the contrary, the intention of the parties must be taken to be that the surety is only liable to the extent limited by the instrument, and does not become a surety out and out. In such circumstances, and also where two joint debtors subsequently agree, to the knowledge of the creditor, that one shall be surety only for the other, the suretyship created, while it obliges the creditor to respect the rights of the surety, leaves the latter still a joint debtor, though possessed of certain surety's rights.

As a joint debtor, the defendant was liable under the contract to sign certain notes, and if these notes were not signed by himself and the principal debtor, he agreed that:—

> Unless the said notes are executed and delivered and the additional collateral security above-mentioned given before the machinery is used, or if the purchaser refuses to accept the said machinery, then and in every such case the whole contract price shall become due and payable forthwith and the purchaser hereby covenants to pay the same forthwith.

Payment by the principal debtor was not pleaded, nor was any such question raised at the trial, and therefore I am of the opinion that it was not necessary for the plaintiff to give any such evidence, payment, either by the principal debtor or by the defendant, being a defence, and if the notes in question were not given—and no evidence was given on this question at the trial—then the liability of the surety would arise under the above covenant.

The only question which remains is, were the goods delivered according to the contract? The trial Judge finds that they were delivered, and that Brubacher did not pay for them, neither did defendant.

The agreement provides that the goods be shipped to the

purchaser, care of the plaintiff company, at Herbert, and they were so shipped. Plaintiff then endorsed the bill of lading to Brubacher Bros., and the machinery in question was delivered by plaintiff to Edwin Brubacher. This is a sufficient performance of the contract.

As defendant neither gave notes as provided by the agreement, nor made any payment, he is liable, and the judgment of the trial Judge should be sustained. The appeal is dismissed with costs.

*Appeal dismissed.*

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## MOON v. STEPHENS.

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*Saskatchewan Supreme Court, Newlands, Brown and Elwood, JJ. July 15, 1915.*

1. PROXIMATE CAUSE (§ VII—10)—ANIMALS RUNNING AT LARGE—FRIGHTENING OF HORSES—INJURY TO PROPERTY.

The perilous alternative one is placed in while driving away animals running at large contrary to a by-law in consequence of which his horses became frightened causing damage to his property, does not render such damage too remote to bar recovery.

Statement

APPEAL from judgment for plaintiff.

*T. D. Brown*, for appellant.

*T. A. Lynd*, for respondent.

The judgment of the Court was delivered by

Elwood, J.

ELWOOD, J.:—In this case, two mule colts, the property of the defendant, were at large contrary to a by-law of the municipality. While at large they came into the plaintiff's yard, and the father-in-law of the plaintiff endeavoured to drive them away. While this was being done, the mules ran around the yard and practically ran into the horses of the plaintiff, causing them to become frightened, and in consequence of this the horses ran over a plow, and one horse was injured, and a disc to which they were attached was damaged. The District Court Judge gave the following damages: depreciation to horse, $75; damage to disc and other machinery, $14.25; paid medicine and veterinary fees, $8; general damages, $25.

It was objected that all of the damages were too remote.

In *Lee* v. *Riley*, 18 C.B.N.S. 722, 734, Erle, C.J., says:—

> The animal had strayed from its own pasture, and it was impossible that her owner could know how she would act when coming suddenly in the night-time in a field among strange horses.

At p. 735 Montague-Smith, J., says:—

> The foundation of the action is negligence on the part of the defendant.

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in omitting properly to keep up his fences, by means of which his mare strayed into the close of the plaintiff and injured his horse. The only question is, whether or not the injury so caused was too remote. It was contended that it was, because the plaintiff gave no proof that the defendant's mare was vicious and that the defendant knew it. I do not think that it was necessary to give any such evidence. The accident might have happened without any vice in the mare. It might have been, and probably was, occasioned by the sudden meeting together of strange horses in the night-time. Even if the plaintiff's horses committed the first assault, the plaintiff (defendant) would, under the circumstances, I think, have been equally liable. It was through his negligence that the horse and mare came together. The damage complained of was the result of that meeting, and I think it was not too remote.

In *Baldrey* v. *Fenton*, 20 D.L.R. 677, it was held to be negligence to permit an animal to run at large contrary to a by-law forbidding the allowing of such animal to run at large.

It was therefore through the negligence of the defendant that this animal was at large, and in my opinion it was in consequence of this negligence that the injury to the plaintiff occurred, and for the consequences of which, in my opinion, the defendant is responsible. The fact that it was while an endeavour was being made to drive the mules away that they ran into the horses does not, in my opinion, disentitle the plaintiff to relief. As Lord Ellenborough, in *Jones* v. *Boyce*, 1 Starkie 493, 495, said:—

> If I place a man in such a situation that he must adopt a perilous alternative, I am responsible for the consequences.

In *Rust* v. *Victoria Graving Dock Co.*, 56 L.T.R. 216, 217, Cotton, L.J., says:—

> The plaintiff is only entitled to those damages which are the direct result of the injury, the act of omission or commission complained of.

And in *Dunham* v. *Clare*, 18 T.L.R. 645, the Master of the Rolls says:—

> In cases of contract the defendant was liable for the consequences which naturally followed from the breach. In cases of tort the liability was somewhat larger than in contract, but still it was measured by what might have been reasonably anticipated as probable.

Applying the above principles to the case at bar, I am of the opinion that the learned District Court Judge properly allowed all of the damages with the exception of the general damages, and the judgment appealed from should be varied by disallowing the $25 allowed for general damages. The appellant should have his costs of appeal.

*Judgment varied.*

## KELLY & SONS v. MATHERS, C.J.K.B., MACDONALD, J., and SIR HUGH JOHN MACDONALD.

MAN.

C. A.

*Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, and Cameron, JJ.A. August 2, 1915.*

1. GOVERNOR (§ I—1)—APPOINTMENT OF COMMISSIONERS—INVESTIGATIONS—CONSTRUCTION OF PARLIAMENT BUILDING.

The appointment of a commission by the Lieutenant-Governor-in-Council to investigate certain matters relating to the construction of a new Parliament building conforms to the powers enumerated in the Inquiries Act, R.S.M., ch. 34, respecting commissions to any matter connected with the good government of the Province.

2. GOVERNOR (§ I—1)—PREROGATIVE POWERS OF LIEUTENANT-GOVERNOR—COMMISSIONS.

The Lieutenant-Governor-in-Council, as the Chief Executive officer, has the prerogative power under the constitutional Acts, and under the Inquiries Act (Man.), to appoint investigation commissions and to clothe them with special powers to compel the attendance of witnesses and production of documents.

3. CONSTITUTIONAL LAW (§ I E 2—126) — ENCROACHMENT ON JUDICIAL POWERS—APPOINTMENT OF ENQUIRY COMMISSIONS — PROVINCIAL POWERS.

The Inquiries Act (Man.), which purports to give an Investigation Commission the same power to enforce the attendance of witnesses as is vested in a court of law in civil cases, which necessarily comprises the power to commit, is within the Provincial legislative powers under sec. 92 of the British North America Act.

[*Attorney-General v. Col. Sugar Refining Co.*, [1914] A.C. 237, distinguished.]

4. WITNESSES (§ II C—45)—PRIVILEGE—CRIMINATING EVIDENCE—GOVERNMENT INVESTIGATION.

The powers conferred on an Investigation Commission to compel the attendance of witnesses and production of documents for the purpose of enabling the government to proceed in civil and criminal prosecutions, is no abridgment of the immunity of giving criminating evidence recognized by the Dominion and Provincial Evidence Acts.

Statement

APPEAL from the judgment of Prendergast, J.

The judgment appealed from is as follows:—

Prendergast, J.

PRENDERGAST, J.:—This is an application for an injunction to restrain the Commissioners, appointed by commission under The Great Seal of the Province, to enquire into certain public matters, under the Inquiries Act, R.S.M., 1913, ch. 34, and which was supplemented by another commission, also under the Great Seal, from proceeding under and by virtue of the said commissions.

In support of the application, the statement of claim and the statement of defence were read, the former setting out at length the two Orders-in-Council, pursuant to which the two commis-

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sions issued, as well as the commissions themselves, the allegations of fact contained in the pleadings being admitted by counsel.

There were also filed letters patent under the Great Seal of Canada, appointing Douglas C. Cameron, Esquire (now Sir Douglas C. Cameron), Lieutenant-Governor in and over the Province of Manitoba.

The Order-in-Council (dated April 19, 1915), pursuant to which the first commission issued, reads in part as follows:—

> That under and by virtue of ch. 34 of the Revised Statutes of Manitoba, 1913, Thomas G. Mathers, Chief Justice of the Court of King's Bench, Daniel A. Macdonald, Judge of the Court of King's Bench, and Sir Hugh John Macdonald, Kt., K.C., be authorized and empowered, and are hereby authorized and empowered, to cause an enquiry to be made into and concerning all matters pertaining to the new Parliament Buildings, . . . and for this purpose to summon, witnesses, to take evidence upon oath, etc.

The commission issued in pursuance of the above Order-in-Council, which is addressed to the Commissioners in the usual form, reads (in part) as follows:—

> Now know ye that, . . . we do by these presents, and under and by virtue of ch. 34 of the Revised Statutes of Manitoba, 1913, nominate, constitute, and appoint you our Commissioners to investigate and enquire into all matters pertaining to the new Parliament Buildings, . . . and for that purpose to summon witnesses, to take evidence on oath. . . .

The Order-in-Council, dated June 23, 1915, pursuant to which the second commission was issued, reads, in part, as follows:—

> That the said Commissioners be empowered to summon before them any party or witnesses, and to require them to give evidence on oath, orally or in writing, and to produce such documents and things as the said Commissioners deem requisite to the full investigation of the matters into which they are appointed to examine.

The Commission (the second) issued pursuant to the immediately preceding Order-in-Council, reads in part as follows:—

> Now know ye that you are empowered to summon before you any party or witnesses . . .. etc.,

in the same words as in the Order-in-Council last set forth.

The statement of claim contains, amongst others, the following allegations:—

11. (a). Since the happening of the events hereinbefore set forth, the said Commissioners have directed the plaintiffs to be summoned before them to give evidence touching on the matters under investigation before them under the said commission, and to produce to the said commission all books, papers or documents in any way relating to the matters under investigation by the said commission, and the plaintiffs have refused to attend for the purpose of giving evidence.

11. (b). The Commissioners have intimated that it is their intention to issue an order to commit the plaintiffs in the case of their refusing to attend to give evidence in pursuance of the order of the commission, and the Commissioners have further intimated that they will enforce any such order by commitment.

11. (c). The Government of the Province of Manitoba, through its Attorney-General, and through counsel representing it, has notified the plaintiffs that it is its intention to bring an action against the plaintiffs, claiming to be entitled to a refund of a very large sum of money alleged to have been improperly and illegally paid over by the Government of the Province of Manitoba to the plaintiffs in connection with the contracts for the erection of the said Parliament Building, also that it is the intention of the Government to take criminal action against the plaintiffs, in connection with the matters arising out of the said enquiry, should the facts appear to justify such action.

The grounds urged by the learned counsel for the applicants, are:—

1st. That the Commissions, and the Enquiries Act, under which they purport to have been issued, are both *ultra vires*, and, 2nd, that the commission has no power to compel plaintiffs to attend and give evidence more particularly in view of the Commissioners' intimation of their intention to commit them in case of their refusing to attend, and of the Attorney-General's expressed intention to prosecute them in the civil and criminal Courts.

It is urgent, being on the eve of long vacation, for the purpose of facilitating an appeal, that I should reach a decision at once, and for this reason, however important the principles raised, I shall forcibly be short in my considerations.

I do not think it necessary to enquire whether the Lieutenant-Governor enjoys any prerogative powers in the matter, and, if any, to compare them with the prerogative right of the Crown to appoint Common Law Commissioners, which could not compel the attendance of witnesses. The Lieutenant-Governor has, at all events, powers given to him by the B.N.A. Act, and the Manitoba Act, as Chief Executive Officer, as well as under the Inquiries Act, under which the Commissions purport to have issued.

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It is true that the first Commission purports, in express terms, to nominate, constitute, and appoint the Commissioners, while the Act, which does not contain such words, provides that only whenever the Lieutenant-Governor deems it necessary to cause certain enquiries to be made, he

> may, by the commission in the case, confer upon the Commissioners, the power of summoning before them any party or witnesses

But, assuming that the Act does not give the Lieutenant-Governor the right of appointment, I am of the opinion that he has that power as chief executive officer, under the constitutional Acts, and it does not seem to me that he is precluded from exercising that right by the issuing of a commission, even, if the document to indicate the class of matters to which it refers, and to confer the special powers required by the commission, purports to be issued under the special Act.

The main point, however, is that the Inquiries Act, although not using the word itself, should be held to give the Lieutenant-Governor the right to also *appoint* the Commissioners. It gives him, in terms, the right, "by the Commission in the case" to confer upon the Commissioners, or persons by whom such enquiry is to be conducted, the powers of summoning before them any party or witnesses, etc., and when such commission, or persons, have such powers conferred upon them, I take it that by the fact they are duly appointed under the Act. Their becoming clothed with the powers of Commissioners, makes them Commissioners, and are thereby appointed as such.

The commission would then seem to me to be in order, whether in the view that the appointment was made under a constitutional right, and the powers conferred under the special Act; or in the view that both the appointment was made and the powers conferred under the Act.

As to the constitutionality of the Inquiries Act, inasmuch as it purports to give the Commissioners the same power to enforce the attendance of witnesses as is vested in a Court of law in civil cases, which comprises the power to commit, I must say I have very serious doubts in the matter. It is a point in which I regret particularly that the time at my disposal does not allow me to dwell at any length. I will only say that after consider-

ing sec. 92 of the B.N.A. Act, dealing with the legislative powers of the Province, I have come to the conclusion, although after a great deal of hesitancy, that sub-section 16 should be held to be broad enough to bring the Inquiries Act within the powers of the Legislature.

With respect to the principle that no man can be compelled to criminate himself in evidence, the principle is still recognized in the Canada Evidence Act, as well as in the Manitoba Evidence Act, although in a manner that at the same time makes allowance for the exigencies of full and complete judicial enquiry. That is to say, the witness is bound to answer, but the statute puts a bar against using such answers to criminate him. But the immunity never extended, that I am aware, to protecting the witness against any indirect advantage which might be gained against him from the fact of such answers.

With reference to the *Parnell case*, where the Commission was constituted by special Act, which also named the Commissioners, and provided for the details of procedure, this was apparently made necessary by the absence of a general Act, such as ours.

As to the *Attorney-General of Australia* v. *Col. Sugar Refining Co.*, [1914] A.C. 237, the point decided there seems to have been merely that the Commonwealth had no right to enquire into matters which belonged to the individual states under the scheme of their Constitution as to residuary powers, which is different in principle from ours. In my opinion, the application should be refused.

But, as the main point raised is one of public interest, concerning the constitutionality of a Public Act, as to which grave doubts might well be entertained, there should be no costs.

*Application refused.*

*E. Anderson*, K.C., and *W. A. T. Sweatman*, for plaintiffs, appellants.

*C. P. Wilson*, K.C., and *H. T. Symington*, for defendants, respondents.

Howell, C.J.M.

HOWELL, C.J.M.:—A careful reading of ch. 34, R.S.M. and the prior statutes of which it is a continuation shews that the legislature assumed that the Lieutenant-Governor-in-Council had

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power to appoint Commissioners to make inquiries concerning public matters. The original Act is known as the Public Inquiries Aid Act, 1873. This statute law has been in force in this Province in practically its present form for more than forty years, and this is the first time its power has been questioned in legal proceedings.

An Act of the Province of Upper and Lower Canada, 9 Viet. ch. 38, with the title, "An Act to empower Commissioners for inquiring into matters connected with public business to take evidence on oath" contains the following recital:—

> Whereas it frequently becomes necessary for the executive government to institute inquiries on certain matters connected with good government of this province.

The Act then proceeds to give powers to the Commissioners practically in the terms of the Manitoba statute first mentioned. It, however, protects witnesses from answering questions which tend to criminate them, and this Act seems to be the progenitor of all Canadian legislation on this subject. An Act giving the same powers became by 31 Viet. ch. 38, the law of the Dominion of Canada and so continued to be the law until the revision of the statutes of Canada in 1906, when, for some reason the procedure was changed, and by ch. 104, the statute declares that the Governor-in-Council may

> whenever he deems it expedient cause inquiry to be made into and concerning any matter connected with the good government of Canada or the conduct of any part of the public business thereof.

The Act then provides that Commissioners may be appointed to hold the enquiry who may summon witnesses and compel them to attend, produce and give evidence just as provided in the Manitoba statute.

Many of the provinces in the Dominion, and perhaps all, had statutes similar to the Manitoba statute, but since the Dominion legislation of 1906, some of the Provinces have changed their laws and adopted legislation similar to that of the Dominion.

In New Zealand, the Governor issues commissions of inquiry without any statutory authority but simply because he is the chief executive officer and a statute there confers power on the Commissioners similar to those in the Manitoba statute. The

power to issue commissions without legislative authority is assumed there. See the language of Chief Justice Stout in *Jellicoe* v. *Haselden*, 22 N.Z.L.R., at 349, 350.

In New South Wales it is also by the legislature taken for granted that the Governor of the State has power to issue a commission of enquiry and by the Royal Commissions Evidence Act of 1901, sec. 3, power is given to the commissioners to summon and examine witnesses and to punish for refusal to give evidence.

It is apparent after this brief review of legislation that in Canada practically ever since the establishment of responsible government, and for many years past in Australia and New Zealand, the legislatures have assumed that the Governor or Lieutenant-Governor-in-Council has power to issue commissions of inquiry, and on this assumption, powers are by statute given to the Commissioners to call and enforce the attendance of witnesses. The Manitoba statute simply provides that upon four subjects if commissions are issued the Commissioners shall have power to call witnesses and enforce their attendance. As I read the Dominion Act, it does not materially differ from the Manitoba Act. It provides that upon certain subjects the Governor-in-Council may issue a commission, and in such cases witnesses shall be compelled to attend, but it does not declare that as to other matters, commissions of inquiry shall not issue.

I see no reason why the Governor-General-in-Council might not issue a commission to inquire as to the number of people in Canada who were left-handed, the only trouble would be that there would be no power to enforce the attendance of witnesses.

Throughout Canada during all the time this legislation was the law, a great many very important commissions were issued, some extremely prominent and perhaps none more so that the Pacific Scandals Commission, and yet this is the first time where, in a Court of justice, the point has been raised that the Lieutenant-Governor-in-Council has no power to issue a commission of enquiry.

In New Zealand and Australia, the statutes say that in all cases where commissions are issued, the Commissioners shall have

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power to enforce the attendance of witnesses and this has led to some litigation there.

In New Zealand, there was an Act passed known as The Commissions of Enquiry Act, 1908, which is practically in the terms of the recent Canadian statute above referred to, that is the statute authorized in direct terms the issue of commissions for certain inquiries on certain limited subjects with power to call witnesses. In a certain case of bribery by a judicial officer a commission was issued to inquire into the matter, and in some way the matter came before the Court of Appeal in *Cock* v. *Atty.-General*, 28 N.Z.L.R. 405. The matter was disposed of so far as the statute is concerned, by holding that the subject-matter of the inquiry did not come within those provided for in the second section of the statute of 1908. On p. 419, this portion of the case is disposed of as follows:—

> We think, therefore, that the Governor-in-Council was not authorized by the Commissions of Enquiry Act to appoint Mr. Justice Sim to make these inquiries.

The matter was not, however, disposed of by holding as above for it was argued that as the Governor-in-Council had power generally to issue commissions and as sec. 15 of the Inquiries Act, which was apparently a continuation of their statute first above referred to—authorized all commissioners appointed by the Governor-in-Council to compel witnesses to attend and give evidence the witnesses were, under this provision, bound to attend and give evidence. On this branch of the case the Court held that to issue a Royal Commission and under it to invoke the general powers of their statute with all its drastic provisions of taking evidence and ordering payment of costs, was either in violation of 16 Charles I., ch. 10, which abolished the Court of Star Chamber, or it indirectly established a new Court to investigate the charge in question and the Court decided against the validity of the Commission.

If I have properly grasped the reasons for judgment in that case I conclude that if the New Zealand statute had been wider and had declared that where a commission of inquiry was issued by the Governor-in-Council to investigate also a matter of the class to which the charge in that case belonged, there should be

power to call and examine witnesses, then, I think, the decision would have been the other way. In other words, the power given to enforce the attendance of witnesses in all matters where commissions are issued must be limited to matters which would not be contrary to existing law unless the statute in direct terms authorizes it.

The statute of New South Wales came up for judicial interpretation before the High Court of Australia by way of appeal from the state Court, in the case of *Clough* v. *Leahy*, 2 Commonwealth L R. 139, wherein the law as to Royal Commissions is fully discussed.

In considering Australian cases it is well to keep in view the wide difference between the constitutional laws of Australia and of Canada. Apparently the Federal Government has no more powers in the former than the Federal Government of the United States. It is also well to keep in view section 71 of the Australian Constitutional Act whereby it is declared that the judicial power of the Commonwealth shall be vested in Federal Courts similar to art. 3, sec. 1, of the United States constitution; quite different from and more restrictive than sec. 101 of the B.N.A. Act. We are not troubled either in the Provinces or in the Dominion by the constitutional restrictions which became the subject of discussion in *Robertson* v. *Baldwin*, 165 U.S. 275.

In the Australian case above referred to the Chief Justice, at p. 153, states as follows:—

> It has been the practice in New South Wales, and I believe in most, if not all, parts of the British Dominions for many years, for the Crown from time to time to appoint Commissioners to make inquiry. . . .

The case practically decides that the Crown may, like an individual, make inquiries, and can do so by appointing persons by Letters Patent, charged with the duty of inquiring, of course these parties so appointed have no power to take evidence on oath unless some statute gives that power, and, of course, the persons so appointed must act lawfully. The Governor-in-Council cannot even by Letters Patent empower Commissioners to act contrary to law. The learned Chief Justice, towards the end of the case, uses this language:—

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It is not necessary to consider whether the statute enlarges the Governor's power to issue such commissions. If the view I have expressed is a correct one there is no need to enlarge it.

In 1902, and by amendment in 1912, the Parliament of the Commonwealth of Australia passed an Inquiry Act on the lines of the present Canadian statute above referred to. It empowers the Governor-General, by Letters Patent, to issue commissions to make inquiry into and report upon any matter specified in the Letters Patent and which relates to or is connected with the peace, order and good government of the Commonwealth or any public purpose or any power of the Commonwealth.

It is to be observed that the Act provides that the legislation shall not in any way limit or prejudice the power of the King or the Governor-General to issue any commission of inquiry. The statute gives wide and drastic powers to compel the attendance of witnesses, and for production of documents, and for the giving of evidence, and penalties may thereunder be imposed to the extent of £500.

A commission was issued by Letters Patent appointing certain gentlemen to inquire into and report upon the sugar industry in Australia, and more particularly in reference to—(a) growers of sugar cane and beet; (b) manufacturers of raw and refined sugar; (c) workers employed in the sugar industry; (d) purchasers and consumers of sugar; (e) costs, profits, wages and prices; (f) the trade and commerce in sugar with other countries; (g) the operation of the existing laws of the Commonwealth affecting the sugar industry; and (h) any Commonwealth legislation relating to the sugar industry which the Commission thinks expedient.

Under this commission certain questions were submitted to the Colonial Sugar Refining Co. and its officers, which company was incorporated under the laws of the State of New South Wales, and the company carried on its business there and in other States of the Commonwealth and in foreign parts. The company and its officers refused to answer a large number of the questions and an action was begun by them against the Commissioners and the Attorney-General to restrain the proceedings. The case was heard in appeal in the High Court of Australia and is reported as *The Colonial* v. *Atty.-Genl.*, 15 Com.

L.R. 182. The Court being divided, the case was referred to the Privy Council, and is reported as *Atty.-Genl. v. Colonial*, [1914] A.C. 237.

I approach the consideration of this case with hesitation because the decision of Lord Haldane has been a subject of adverse criticism in law journals in both England and Canada.

By the Australian Constitutional Act, all legislative power as to peace, order and good government of the people remains in the several federated states unless by direct terms it is vested in the Commonwealth. Sec. 51 of the Act vests in the Commonwealth power to make laws for the peace, order and good government of the Commonwealth with respect to thirty-six specific subjects enumerated in detail; three other subjects are added which need not be considered here. There is a further provision in the constitution that it may be amended giving thereby wider powers to the Commonwealth, the procedure for this purpose is provided in section 128 and requires the assent of electors, the preliminary steps for which must originate in the Federal Parliament by an Act duly passed as therein provided.

Sub-sec. 39 of sec. 51 extends the right to legislate as to peace, order and good government to

> matters incidental to the execution of any power vested by this constitution in the Parliament or in either House thereof or in the government of the Commonwealth.

It is well to keep all this legislation in view for the proper consideration of the last-mentioned case.

All the Judges in the High Court of Australia held that the Commissions Act was within the powers of the Parliament, but the Chief Justice and Judge Barton held that the powers conferred by the Act did not authorize the Commissioners to compel the attendance of witnesses to give evidence on matters, information as to which is relevant only to possible amendments to the constitution under sec. 128, and it was held by them that therefore a large proportion of the proposed questions, and production was beyond the powers of the Commission. I conclude from the judgments that, if by the constitution, parliament could have legislated on the subject without the aid of sec. 128, the case would have been differently decided. It seems clear

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that, by the constitution, Parliament has only the powers given by sec. 51, and the "matters incidental" referred to in sub-sec. 39 are those incidental to the specific matters enumerated in the preceding sub-secs. and not to powers which parliament might thereafter acquire under sec. 128. The states under sec. 107 had the absolute right over the liberty of the subject in all respects except as granted by sec. 51 and the Federal Parliament had no power to take away that right by compelling witnesses under heavy penalty to give evidence against their will upon subjects which might some day by the consent of the people be brought within the federal power. The other two Judges held that all the questions should be answered.

Lord Haldane gave the judgment in the Privy Council. On p. 255, he states:—

> It is, of course, true, that under the section the Commonwealth Parliament may legislate about certain forms of trade, about bounties and statistics, and trading corporations. Such legislation might possibly take the shape of statutes requiring and compelling the giving of information about these subjects specifically. But this is not what the Royal Commissions Acts purport to do. Their scope is not restricted to any particular subject of legislation or inquiry, and no legislation has actually been passed dealing with specific subjects such as those to which their Lordships have referred as matters to which legislation might have been directed giving sanction to some of the inquiries which the Royal Commissioners are now making. And the field of the Royal Commissions Acts —which are to apply to any Royal Commission, whether issued under statutory authority or under the common law powers of the Crown—goes far beyond any of the first thirty-six of the classes of subjects enumerated in the section.

He then proceeds to decide with the Chief Justice and Barton, J., that there was no power to make inquiries under oath as to matters relating to some future powers which might be got by the Federal Parliament by an amendment of the Constitution under sec. 128, and he adds,

> No such power of changing the Constitution, and thereby bringing new subjects within the legislative authority of the Commonwealth Parliament, has been actually exercised, and until it has been it cannot be prayed in aid. . . . It is clear that any change in the existing distribution of powers has been safeguarded in such a fashion that on a point such as that before the Board of Commonwealth, Parliament could not legislate so as to alter that distribution merely of its own motion.

Again in p. 257, His Lordship states:—

And until the Commonwealth parliament has entrusted a Royal Commission with the statutory duty to inquire into a specific subject, legislation as to which has been by the Federal Constitution of Australia assigned to the Commonwealth Parliament, that parliament cannot confer such powers as the Acts in question contain on the footing that they are incidental to inquiries which it may some day direct. Having arrived at this conclusion, their Lordships do not think that the Royal Commissions Acts, in the form in which they stand, could, without an amendment of the Constitution, be brought within the powers of the Commonwealth Legislature. . . . Without redrafting the Royal Commissions Acts and altering them into a measure with a different purpose, it is, in their Lordships' opinion, impossible to use them as a justification for the steps which the Royal Commission on the Sugar Industry contemplates in order to make its inquiry effective.

This language has been the subject of keen controversy. The Chief Justice and Barton, J., held that the objectionable questions should not be answered because there was no power to pass the statute in such wide and inclusive language, but they held that it must be read in a very limited way so as to exclude the objectionable questions, and by so construing and limiting the statute they held it within the power of the Federal Parliament. After giving the judgment of the Lord Chancellor anxious consideration, I construe it to be simply a declaration that the statute, read in its ordinary and clear language, while in some respects within legislative power, yet in chief and mainly giving rights far beyond the legislative power was *ultra vires*. It was strongly urged that the case decided that to make such legislation good, the Act must in specific language set forth the subject upon which the Commissioners may enforce the attendance of witnesses.

If this is the true construction of the case then the Canadian as well as the Manitoba statute is *ultra vires*. I think the case is not an authority to support that proposition.

It was also urged that the Manitoba statute did not in direct language give power to issue commissions of inquiry. The statute of Upper and Lower Canada above referred to, the statute of Canada, 31 Vict. ch. 38, the statutes of the various provinces including Manitoba, the statutes of New Zealand, of New South Wales and the Australian statute of 1902, all assume that the Governor-in-Council has this right and legislate on that assumption. Chief Justice Stout, before-mentioned, assumed the power

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to exist, and finally the Chief Justice of Australia, the head of that distinguished Australian Court, held that the Governor-in-Council had a right to inquire into matters of public interest like a private individual if he chose. The method taken is to issue letters patent in the King's name to certain Commissioners to make inquiries and this is commonly called a Royal Commission. Colonial governments and legislatures have assumed that this power existed and have on this assumption acted and legislated, and I can see no reason why they should not so assume. I think there is such power, but if not, then the legislature, by assuming that the power existed and by giving power to the appointees, by necessary implication, authorized the issue of such Commissions.

To me it is clear that the four matters referred to in the Manitoba statute are all within the legislative competence of this Legislature and to investigate the transactions of the Government and its officials and the contractors connected with the erection of the Legislative Buildings clearly come within the first two matters mentioned in the statute.

It was urged in the argument that the Commissioners were not empowered to and should be restrained from making a report and finding of fact. If they do, I do not see what harm it can do to anyone. Commissioners are appointed to make enquiries for the benefit of the executive. Take the case of ordinary Royal Commissions without power to call witnesses, are they to take down questions and answers given by those who are willing to give information and simply return this to the executive? Are they to make inquiry and then not tell what they have found out as the result of the inquiry? They make an inquiry to find facts, to find the conditions of matters, and having informed themselves, they hand over this information. Without a report it seems to me their work would be incomplete.

Objection is taken that the inquiry is usurping matters reserved for the Courts and this point has been discussed in Australian cases. It is sufficient to point out that legislation as to property and civil rights are within the legislative control of the provinces and our Courts are not given the exclusive

rights which are given to the Commonwealth Courts above commented on.

The fair and reasonable meaning to be given to the statute, to my mind, empowers the Commissioners to procure evidence, both written and verbal, and therefore they can compel witnesses to give evidence and to produce documents. The words "to compel them to give evidence," following words giving them power to order production of documents is simply to compel the party called to give evidence written or verbal or both.

This case has been argued on both sides with great skill, and counsel have given much assistance in this matter.

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The appeal is dismissed with costs and the action is dismissed with costs.

RICHARDS, J.A., dissented.

Richards, J.A. (dissenting)

PERDUE, J.A.:—For the reasons more fully set forth in the judgments of the Chief Justice and Mr. Justice Cameron, I agree in the conclusion that the Lieutenant-Governor-in-Council has power to issue a commission for the purpose of investigating matters of purely provincial character, that is to say, matters which fall strictly within one of the classes of subjects assigned exclusively to a provincial legislature. The Act respecting Commissioners to make Inquiries concerning Public Matters, R.S.M., 1913, ch. 34, assumes that the Lieutenant-Governor-in-Council possesses the power to issue commissions of inquiry, a power which by itself would not entitle the Commissioners or persons named to compel the attendance of witnesses or to administer oaths. The Act was passed for the purpose of augmenting the powers of the executive in these and other respects. If the Lieutenant-Governor-in-Council does not possess the power to issue such a commission the Act is wholly meaningless. The legislature of the Province could, if necessary, confer that power, and where it declares that, "Whenever the Lieutenant-Governor-in-Council deems it expedient to cause inquiry," etc., he "may by the commission in the case confer upon the Commissioners" power of summoning witnesses, etc., it must be taken that the necessary power was intended to be conferred upon him, if it was not already possessed by him. There are many instances

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to be found where statutes have been held to grant extensive powers by implication. See *R.* v. *Greene*, 21 L.J.M.C. 137; *Cullen* v. *Trimble*, L.R. 7 Q.B. 416, 41 L.J.M.C. 132; *Ex p. Martin*, 4 Q.B.D. 212, 491; Maxwell on Statutes, 5th ed., 575-581.

The Act, R.S.M., ch. 34, carefully confines the powers granted in respect of commissions to the four following subjects: (1) any matter connected with the good government of the Province; (2) the conduct of any part of the public business thereof; (3) the conduct of any institution therein receiving provincial aid; and (4), the administration of justice therein. All of these are purely provincial matters. The investigation purporting to be authorized by the Commission attacked in the present case comes under either (1) or (2) of the above subjects, in some respects it may come under either of them. At all events the investigation is intended to deal with matters which are strictly within the legislative powers of the Province.

It was strongly argued that the recent decision of the Privy Council in *A.-G. for Australia* v. *Colonial Sugar Refining Co.*, [1914] A.C. 237, was a conclusive authority supporting the plaintiffs' contention in the present case. Lord Haldane in giving judgment in the Australian case has pointed out the wide difference that exists between the power to make laws conferred upon the parliament of the Commonwealth and that possessed by the parliament of Canada. The former obtained its powers by transfer from the federating Colonies. It received power to make laws for the peace, order and good government of the Commonwealth.

> But this power (he says), is not conferred in general terms. It is, unlike the corresponding power conferred by sec. 91 of the Canadian Constitution Act of 1867, restricted by the words which immediately follow it. These words are "with respect to," and then follows a list of enumerated specific subjects.

> The Australian Royal Commissions Acts, however, purported to empower the Governor-General to issue commissions to persons authorizing them to make inquiry into and report upon any matter specified in the letters patent,

> and which relates to or is connected with the peace, order and good government of the Commonwealth, or any public purpose or any power of the Commonwealth.

Power was given to summon witnesses, to administer oaths, to compel the attendance of witnesses and the giving of evidence, and to impose fine or imprisonment in cases of disobedience or contempt. It was held that none of the subjects of legislation enumerated as those assigned to the Commonwealth Parliament, related to

> that general control over the liberty of the subject which must be shewn to be transferred from the individual states if it is to be regarded as vested in the Commonwealth.

The Royal Commissions Acts, it was pointed out, were not restricted to any particular subject of legislation or inquiry and there was no legislation which might give sanction to the inquiries that were being made by the Commission referred to in the case. The Acts were therefore held to be *ultra vires* in so far as they purported to enable a Royal Commission to compel answers generally to questions, or to order the production of documents or otherwise enforce compliance by the members of the public with its requisition. The decision rested upon the ground, as I understand it, that the Acts were too wide and purported to authorize inquiries which included matters over which the jurisdiction of the Commonwealth Parliament did not extend, and to give powers which were not within the scope of its constitutional authority to confer.

The commission in the present suit is issued by the Lieutenant-Governor-in-Council of a province of the Dominion with the additional powers conferred by a statute passed by the legislature of the province. Within its own field of legislation the Province is supreme: *Hodge* v. *The Queen*, 9 App. Cas. 117, 132. Comprised in that field we find the following amongst other subjects:—

(13) Property and civil rights in the province; (14) The administration of justice in the province, including the constitution, maintenance and organization of Provincial Courts, both of civil and criminal jurisdiction, and including procedure in civil matters in those Courts; (15) The imposition of punishment, by fine, penalty or imprisonment, for enforcing any law of the province made in relation to any matter coming within any of the classes of subjects enumerated in this section; (16)

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Generally, all matters of a merely local or private nature in the province.

No. 13 confers upon the Province, in the exercise of provincial powers, control over the liberty of the subject. No. 14 places the administration of justice and all the machinery of the civil Courts within the control of the province. By No. 15 the provincial legislature may impose fine or imprisonment for disobedience of a law enacted by that body. No. 16 has been interpreted by the Privy Council as follows:—

> In sec. 92, No. 16, appears to them (their Lordships) to have the same office which the general enactment with respect to matters concerning the peace, order and good government of Canada, so far as supplementary of the enumerated subjects, fulfils in sec. 91. It assigns to the provincial legislature all matters in a provincial sense, local or private, which have been omitted from the preceding enumeration: *Atty.-Gen. for Ont.* v. *Atty.-Gen. for Dom.* [1896] A.C. 348, 365.

Under the above clauses a provincial legislature possesses the very powers which Lord Haldane shewed to be lacking in the Commonwealth Parliament. The Act in question in the present case, R.S.M., ch. 34, carefully confines the investigations authorized by it to provincial matters. In my opinion, the Privy Council decision relied upon by the plaintiffs is not applicable to the present case.

It is true that difficulties may arise during the taking of evidence, as to whether questions that may be asked, do or do not exceed the scope of the investigation, but the mere apprehension that such questions may arise, or that a proper ruling may not be given when they do arise, is not a ground for restraining the inquiry. We must assume that the Commissioners will conduct the inquiry strictly within their powers.

I think the power to report is necessarily implied from the words used in sec. 1 of ch. 34. It would be useless to inquire or to investigate unless the Commissioners made known the result. I think the appeal should be dismissed.

Cameron, J.A.

CAMERON, J.A.:—This action is brought by the plaintiffs against the Hon. Thomas Graham Mathers, the Hon. Daniel A. Macdonald and the Hon. Sir Hugh J. Macdonald, who are named as Commissioners in the commission issued pursuant to Order-in-Council, dated April 19, 1915, which was supplemented by

the further Order-in-Council, dated June 23, 1915, all of which are set forth in the statement of claim. The Attorney-General is also a defendant in the action. The Commissioners were directed to make inquiries into certain matters relating to the erection of the new Parliament Buildings by the Government of this province for the construction of which the plaintiffs were the contractors. It is asked by the statement of claim that the Orders-in-Council and the commission be declared *ultra vires* and void, that, if they are *intra vires*, it be declared that the Commissioners are not authorized to compel the giving of evidence or the production of documents, and that the plaintiffs should not be required to attend and give evidence or produce their books and papers. It is further asked that an injunction be granted restraining the defendants from further proceeding under the commission and from compelling the plaintiffs to attend to give evidence or produce their books or from making any order of commitment for refusal to attend.

The Commissioners, in their defence, admit the allegations in the statement of claim setting forth the Orders-in-Council, the commission, the assembling and sittings of the Commissioners pursuant thereto and those allegations stating that the Commissioners have directed the plaintiffs to appear to give evidence and produce their books and papers which the plaintiffs have refused to do, that the Commissioners have intimated their intention to issue an order to commit the plaintiffs in the event of their refusal so to attend, and that it is the intention of the Attorney-General of the Province to bring an action against the plaintiffs for a return of a large amount of money alleged to have been illegally and improperly paid over to them and to take criminal action against the plaintiffs with reference to matters arising out of the inquiry held by the Commissioners should the facts appear to justify same.

By consent the motion for judgment was heard on the pleadings before Mr. Justice Prendergast, who dismissed it. On this appeal, by consent, further material on behalf of the plaintiffs was allowed to be used. This additional material refers to proceedings before the Commissioners and now forms part of the record.

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The first question raised is as to the authority and jurisdiction of the legislature of this province to pass the Act, ch. 34, R.S.M., an Act respecting Commissioners to make Inquiries Concerning Public Matters. This has been in force in this province since 1873, it having been originally passed as 36 Viet. ch. 21. In its terms it is strictly confined to this province. As to the power of the legislature so to enact it seems to me beyond doubt. Amongst the numerous decisions dealing with the powers of the Provincial Legislatures under sec. 92 of the B.N.A. Act, I refer to *Hodge* v. *The Queen*, 9 App. Cas. 117, particularly at p. 132.

> When the B.N.A. Act enacted that there should be a legislature for Ontario, and that its legislative assembly should have exclusive authority to make laws for the province and for provincial purposes in relation to the matters enumerated in sec. 92, it conferred powers not in any sense to be exercised by delegation from, or as agents of, the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by sec. 92 as the Imperial Parliament in the plenitude of its powers possessed and could bestow. Within these limits of subjects and area, the local legislature is supreme.

This luminous statement has stood for more than thirty years as an authoritative definition of the powers of our local legislatures. It has been amplified by other decisions of the Privy Council, such as that in *The Liquidators of the Maritime Bank* v. *Receiver-General*, [1892] A.C. 437. I regard the matters set forth in chapter 34 as amongst those over which the legislature is supreme. That the statute is general in form is, to my mind, no objection to it. That it does not make or authorize such inquiries incidental only to future legislation is, I think, immaterial. The Imperial Parliament could pass such legislation, and if that be so there can be no doubt of the authority of the provincial assembly, legislating within its ambit of powers.

The decision of the Judicial Committee in *A.-G.* v. *Colonial Sugar Co.*, [1914] A.C. 237, was cited to us. In my reading of that case it was made to depend on peculiar provisions of the Australian constitution, different from what are to be found in our constituent Act. It was held that the Australian Federal Government received only those powers that were expressly delegated to it by the several states, which retained those not so

delegated. Consequently the rights and remedies given by the Royal Commission Act then in question, not having been ceded by the states, could not be exercised by the Commonwealth Government. This differentiates the Australian system from our own, which is thus set forth by Lord Watson in the *Maritime Bank* case, p. 441.

> The object of the Act was neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy.
>
> . . .
>
> But in so far as regards those matters which by sec. 92, are specially reserved for provincial legislation, the legislature of each province continues to be free from the control of the Dominion and as supreme as it was before the passing of the Act.

It was further argued that the statute, ch. 34, R.S.M., does not in its terms authorize the Orders-in-Council or the commission in question. I confess I can see no great difficulty on this point. The matters involved were and are transactions relating to the construction of a provincial public building—purely a local and provincial undertaking. I would read the words in the Act "any matter connected with the good government of this province" in no restricted sense. "Good government" is intended to be a term of wide meaning, and is used in the B.N.A. Act itself. To my mind, it involves and connotes the ideas of public welfare, of public business and of public purpose. And where charges are made that the provincial moneys have been wrongfully expended in connection with the construction of a provincial public building, it seems to me clear that they affect the public welfare, and good government of the Province, and are properly the subject-matter of investigation under the Act. Moreover, such moneys must have been expended by the provincial government through its proper departments and thereby the transactions in question were part of the public business of the Province. I entertain no doubt that the Orders-in-Council are properly founded and the commission also. We must give this Act, which must be deemed to be remedial in its character, such a fair, large and liberal construction and interpretation as will best insure the attainment of its object in accordance with

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the rule of construction laid down in our Interpretation Act (sec. 13, ch. 105, R.S.M.).

The Lieutenant-Governor of this province is on the same footing as to prerogative and power as the Lieutenant-Governors of the other provinces: Lefroy on Legislative Power in Canada, 104. That is evidently the meaning of sec. 2 of the Manitoba Act when applied to the office of Lieutenant-Governor. Secs. 64 and 65 of the B.N.A. Act refer, when taken together, to all the provinces originally entering confederation. There is no reason that I can see for drawing or attempting to draw any distinction between the authority of the Lieutenant-Governor of this Province and those of the others. That power is expressly declared in The Executive Government Act, ch. 67, R.S.M., so far as the Legislature of Manitoba can enact.

A Lieutenant-Governor, when appointed, is as much the representative of Her Majesty for all purposes of provincial government as the Governor-General himself is for all the purposes of Dominion government: Lord Watson in *Maritime Bank* v. *Receiver-General*, *supra*, p. 443.

The right of the Crown to appoint Commissioners to make inquiries has been long established. It was the lack of power on the part of the Commissioners to enforce attendance of witnesses and to compel them to give evidence that required supplementing by legislation. This appears from the title of the first Canadian Act, ch. 38, 9 Viet. Statutes of Canada, An Act to empower Commissioners for inquiring into matters connected with the public business, to take evidence on oath.

This subject is dealt with at length by Griffith, L.J. in *Clough* v. *Leahy*, 2 Com. L.R. 153, in his judgment on appeal from the Full Court of New South Wales. He refers to the Dolly's Brae Commission in Ireland, and to the Sheffield Commission in connection with which a special Act of Parliament was passed compelling the attendance of witnesses and protecting those who gave evidence from civil and criminal consequences.

In *Clough* v. *Leahy*, the statute dealt with, given in the report at p. 140, indicates a recognition of the pre-existence of the power of the executive to appoint Commissioners. The statute referred to in the *Sheffield* case, ch. 8, 30-31 Viet. indicates precisely the same thing.

It is true that the Act does not contain specific words auth-

orizing the Lieutenant-Governor-in-Council to appoint Commissioners. But the Act is entitled, An Act respecting Commissioners to make Inquiries Concerning Public Matters. And when the Act itself says:—

> The Lieutenant-Governor may, by the commission in the case, confer upon the commissioners or persons by whom such inquiry is to be conducted, the power of summoning before them any party or witness, etc.,

the existence of power to appoint is clearly presupposed and implied.

That the investigations of the Commissioners may, in their ramifications, involve matters not within the provincial jurisdiction cannot surely have the effect of invalidating the Orders-in-Council or the commission. The object of the commission is plainly not to displace the ordinary tribunals but to secure information in the public interest. It is auxiliary to, and not in lieu of, the Courts of justice.

It is objected that the Act gives no power to authorize the Commissioners to make a report. But the Act speaks of the Lieutenant-Governor-in-Council deeming it expedient "to cause an inquiry to be made" and of their "full investigation of the matters into which they are appointed to examine," and these expressions infer conclusions from, as well as listening to and perusing, the evidence, and such conclusions may certainly be asked for from, and submitted by, the Commissioners. Even on the hypothesis that the power to ask the Commissioners to report is not implied in the Act, it seems to me there is nothing whatever to prevent the Lieutenant-Governor-in-Council requesting the Commissioners to do so.

A full investigation in complicated matters involving a conflict of evidence where the Commissioners have heard many witnesses testifying in person, would certainly be unsatisfactory and incomplete without an expression of their conclusions.

It is the fact that civil proceedings have been taken and are now pending against these plaintiffs by the Attorney-General for the recovery of the sums mentioned in the Order-in-Council. And it may be that ultimately criminal proceedings will be instituted. But neither the fact nor the possibility can have the effect of invalidating the Orders-in-Council or the commission

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here in question. The imposition of punishment, by fine, penalty or imprisonment for enforcing any law of the province passed within its jurisdiction is specifically given to the province by sec. 15 of sec. 92 of the B.N.A. Act. As a result, I think the powers given by the Act to summon witnesses and to require them to give evidence and to produce documents are beyond question, and are, as declared by ch. 34, the same as those of a Court of law in civil cases. The words "to compel them to give evidence" are evidently intended to include the production of documents, which is one way, and an effective way, of giving evidence. To withhold these powers from the Commissioners would, or might, have the effect of rendering the Act nugatory. We must give the words used a fair, large and liberal, not a narrow, construction. I refer to Maxwell on Statutes, 5th ed., at pp. 576 *et seq.* and authorities there quoted. It is to be strongly presumed that the powers given will be exercised with discretion and with due regard for the rights of all parties interested.

It does appear to me clear there is much to favour the contention that this is not a case for exercising the discretionary right to grant an injunction. If the Act in question, or the Orders-in-Council, are invalid then a declaration to that effect puts an end to the matter. If, however, they are valid and the only questions in dispute are as to the right of the Commissioners to summon witnesses, compel their attendance and impose penalties for non-attendance or refusal to answer, then the occasion for action has not yet arisen. Upon the execution of an order or warrant for committal, the occasion would arise and there would be opportunity to test the validity of the proceedings. Here the plaintiffs have not been subpœnaed and no questions of any kind have been addressed to them. The position is different from that in the *Attorney-General* v. *Colonial Sugar Co.* case. There is no necessity, however, for dealing further with this point. In my opinion the appeal must be dismissed.

*Appeal dismissed.*

## LEAMY v. THE KING.

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Ex. C.

*Exchequer Court of Canada, Audette, J. January 5, 1915.*

1. PUBLIC LANDS (§ I A—3)—GRANT OF—BED OF NAVIGABLE RIVER—TITLE TO.

In a grant of part of the public domain from the Crown to a subject the bed of a navigable river will not pass unless an intention to convey the same is expressed in clear and unambiguous terms in the grant.

[*Atty.-Gen. B.C.* v. *Atty.-Gen. Can.*, 15 D.L.R. 308, [1914] A.C. 169; *Atty.-Gen. Que.* v. *Scott*, 34 Can. S.C.R. 615, and *Maclaren* v. *Atty.-Gen. Que.*, [1914] A.C. 258, 15 D.L.R. 855, referred to.]

Statement

PETITION of right seeking a declaration of title in certain lands covered by water, being part of the bed of the Gatineau river in the Province of Quebec.

*H. Aylen*, K.C., for suppliants.

*F. H. Chrysler*, K.C., for respondent.

Audette, J.

AUDETTE, J.:—The suppliants brought their petition of right to have it declared, *inter alia*, that they are vested as proprietors with all of those portions of the bed of the Gatineau river, within the boundary lines of lots 2 and 3 in the 5th range of the township of Hull, Province of Quebec,—within the ambit of the Crown Grant of January 3, 1806.—whereby the township of Hull is created and a number of lots thereof are given in severalty to the parties in the said grant mentioned, and more especially to Philemon Wright, senior, their original *auteur*, under whom they claim.

The suppliants further seek to have it declared that they are proprietors and owners of the sand and sand-bars on that portion of the river, and furthermore they ask that the respondent be ordered to remove the piers, works, booms and logs in the said river, and that a sum of $500 per year be paid them for the use of the bed of the river in the past since the respondent so took possession of part of that portion of the river by the erection of piers or otherwise, and that *possession* of the bed of the river be given them.

For the purposes of this case, it is, at the outset, found that the suppliants herein, by the divers mesne assignments and the evidence of record, have all the right, title and interest in the lots in question as those possessed by their original *auteur* Philemon Wright, senior, under the Crown grant in question.

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It is further found that the Gatineau river, a river of considerable size, at the point in question, is navigable and *flottable en trains ou radeaux*, as practically conceded at trial by suppliants' counsel. Indeed, the river Gatineau, from its mouth, on the northern bank of the Ottawa river, is *navigable* and so *flottable* for a distance of about four miles, up to Ironsides, the head of navigation. Within these four miles there is a drawbridge across the river, at about $\frac{1}{4}$ to $\frac{1}{2}$ a mile from the mouth of the river. The bed of the river claimed herein is about $\frac{1}{4}$ of a mile higher up from the drawbridge and extends to almost the C.P.R. bridge, as more particularly shewn on plan ex. No. 5. Moreover, from Ironsides down to the mouth of the river Gatineau, the vessels navigating the same have access to the Ottawa river which is also navigable and thereby allows of such vessels to travel, for trade and commerce, from Ironsides to Montreal and Quebec, etc. For a number of years a lumbering firm, carrying on a large business there was shipping lumber in barges 75 by 100 ft. long and 18 ft. beam, carrying from 300,000 to 350,000 ft. of lumber, b.m., which were towed down to Montreal and Quebec. Rafts (*trains et radeaux*), of 24 ft. wide by 72 ft. long and 36 inches deep were also, during a number of years, taken from Ironsides to the mouth of the river Gatineau. All of this goes to shew that the river, at the place in question, is obviously navigable.

The Crown grant of the land in question to Philemon Wright is made out of *special grace, certain knowledge* and *mere motion*, and in free and common soccage

> upon the terms and conditions, and subject to the provisions, limitations, restrictions and reservations prescribed by the statute in such case made and provided, and by our Royal Instructions in this behalf,

and the grant is absolutely silent as to any right on navigable rivers.

How should such a Crown grant be construed and interpreted? The trite maxim and rule of law for our guidance in such a construction is well and clearly defined and laid down in Chitty's *Prerogatives of the Crown*, p. 391-2, in the following words:—

> In ordinary cases between subject and subject, the principle is, that the

grant shall be construed, if the meaning be doubtful, most strongly against the grantor, who is presumed to use the most cautious words for his own advantage and security,—But in the case of the King, whose grants chiefly flow from his royal bounty and grace, the rule is otherwise; and Crown grants have at all times been *construed most favourably for the King*, where a fair doubt exists as to the real meaning of the instrument . . . Because general words in the King's grant never extend to a grant of things which belong to the King by virtue of his prerogative, for such ought to be expressly mentioned. In other words, if under a general name a grant comprehends things of a royal and of a base nature, the base only shall pass.

Approaching the construction of the grant in question in this case with the help of the rule above laid down, it must be found that in the absence of a special grant, especially expressed and clearly formulated, of the bed of the Gatineau river, a navigable river at the point in question, which therefore belongs to the King by virtue of his prerogative, and which is held by him in trust as part of the public domain constituting the *jus publicum*, the land only passed and not the bed of the river.

Then the limitations, restrictions and reservations under which the grant was made as provided "by the statute and our Royal instructions," are to be found in the Royal instructions to Lord Dorchester as Governor of Lower Canada, and in a Proclamation published in the *Quebec Gazette* on February 16, 1792. Both of these documents are to be found in the Public Archives and more especially in the publication of 1914, by Messrs. Doughty & McArthur, containing the "Documents relating to the Constitutional History of Canada from 1791 to 1818," at pages 13 and 61 *et seq.*. The same instructions are to be found also to Lord Dorchester as Governor of Upper Canada, p. 40 of the same volume, but we are here concerned with Lower Canada only. At p. 21, under secs. 31, 32 and 33, will be found the instructions to the Governor as to the method of granting these lands, and the following excerpt will shew how such lands are granted, viz.:—

It is our will and pleasure that the lands to be granted by you as aforesaid, shall be laid out in townships, and that each inland township shall, as nearly as circumstances shall admit, consist of ten square miles; *and such as shall be situated upon a navigable river* or *water* shall have a *front* of nine miles and be *twelve miles in depth*, and shall be subdivided in such manner as may be found most advisable for the accommodation of the settlers, and for making the several *Reservations* for *Public Uses*, etc.

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And in sec. 33, the following is also to be found, viz.:—

As likewise that the breadth of each tract of land to be hereafter granted be one-third of the length of such tract, and *that the length of such tract do not* extend along the banks of any river, *but into the main land*, that thereby the said grantees may have each a convenient share of what accommodation the said river *may afford for navigation or otherwise*.

From these instructions it will therefore appear that the lands so granted, *as nearly as circumstances shall admit*, should have their breadth on the front of navigable rivers, and the length extending in the mainland; but in no case to embody the bed of the river. And under sec. 32, due regard is given in making these grants subject to the several *Reservations for Public Uses;* which, in other words, would protect the paramount title in the bed of the river which *primâ facie* is in the Crown for the public. The bed of all navigable rivers is by law vested *primâ facie* in the Crown. But the ownership by the Crown is for the benefit of the subject and cannot be used in any way so as to derogate from or interfere with such rights which belong by law to the subjects of the Crown. Hence in a grant of part of the public domain from the Crown to a subject, the bed of a navigable river will not pass unless an intention to convey the same is expressed in clear and unambiguous terms in the grant.

This right to use a navigable river as a highway, is part of the *jus publicum*.

Finding its subjects exercising this right as from immemorial antiquity the Crown as *parens patriæ* no doubt regarded itself bound to protect the subject in exercising it, and the origin and extent of the right as legally cognizable are probably attributable to that protection, a protection which gradually came to be recognized as establishing a legal right enforceable in the Courts: *Per* Haldane, L.C., in the case of the *A.G. B.C.* v. *A.G. for Canada*, 15 D.L.R. 308, [1914] A.C. p. 169. See also Coulson & Forbes, The Law of Waters, 3rd ed., pp. 28, 29, 36.

It would, therefore, appear that the Crown, as trustee for the public, is the guardian of such right held by the public to use navigable rivers as a public highway, and it thus rests with the Crown to protect its subjects against encroachments in violation of such *jus publicum*. The public, all of His Majesty's liege subjects, have a right to use navigable waters which form

part of the public domain and which are *inalienables and imprescriptibles*. The suppliants' grant is subject to this *jus publicum* and to the paramount title in the bed of the river which *primâ facie* is in the Crown for the public. Truly, it would be a singular irony of law if this right of the Crown, held in trust for the public, could thus be taken away by such a Crown grant, which is absolutely silent in respect thereto.

Coming now to the *Maclaren* case, 15 D.L.R. 855, [1914] A.C. 264, a case relied upon by both parties, it must be said that the judgment of the eminent Judge in that case will be of great assistance here in arriving at a proper conclusion—the law affecting the present controversy having been so clearly discussed in the course of his pronouncement. In the *Maclaren* case neither party set up title in the public as in the present case. The scope of the decision of the Privy Council in that case is clearly defined at page 274, in the following words:—

"So far as the river Gatineau is concerned, the decision of this case will do no more than decide whether or not the language of certain existing grants was sufficient to pass particular portions of the bed, or whether, after such grants were made, they still remained in the *lands of the Crown* so that it had power to grant them by a later grant."

And their Lordships having found that the Gatineau river, at the point in question in that case, was only *flottable a buches perdues* and that the claimant was owner of the land on each bank, that ownership went *ad medium filum aquæ*.

In the present case it having been found that the Gatineau river opposite the lands in question, is both navigable and flottable *en trains ou radeaux* and that the bed of the river claimed is on such a navigable river, the logical corollary of the holding in the *Maclaren* case is, therefore, necessarily that the bed of the river in the *locus in quo*, did not pass with the grant of the land on each side, without any specific grant of the same.

It must, however, be said that the *Maclaren* case did not decide the question of law involved in the present case. It is true, at p. 865, the following statement is to be found, viz.:—

There is no trace in Canadian law of any exception to the rule that the bed of a stream presumably belongs to the riparian owner *except in*

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*the cases where that bed is in its nature public property*, and therefore such *presumption of ownership cannot exist*. A perusal of the seignorial decisions and the judgments of those who took part in them makes it clear that the exclusion of the beds of navigable and floatable rivers from the grants to seigniors was not by *reason of express words* in the grants nor of any special rule of law formulated *ad hoc*, but was a consequence flowing from the jurisprudence then existing derived from French sources under which the beds of such rivers were held to form part of the *domaine public* and thus to be incapable of becoming private property. But it followed that they were inalienable and this was fully recognized. They are always spoken of as *inaliénables et imprescriptibles*. So much of that jurisprudence as remains is to be found in Art. 400 of the Civil Code, and on the construction to be given to that section must depend the status of the beds of these rivers from the point of view of property.

Their Lordships, however, under the circumstances of the *Maclaren* case, as presented to them, felt that the question of law, as to whether or not *the beds* of navigable and floatable rivers are public property incapable of being alienated, was of such importance (p. 866) that it should only be decided in some case in which the parties would be respectively interested in the one and the other of the two rival interpretations so that an opportunity would be given for full argument thereon.

Long prior to the compilation of the *Code Napoleon*, it was abundantly clear under the law then extant that the beds of navigable and floatable rivers belonged to the *domaine public*. Accordingly when the Code Napoleon was published, this very law found its way into it and is expressed in art. 538 thereof in language identical with that which is now to be found in art. 400 of the Civil Code, P.Q., which reads as follows:—

400. Roads and public ways maintained by the State, navigable and floatable rivers and streams and their banks, the sea-shore, lands reclaimed from the sea, ports, harbours and roadsteads and generally all those portions of territory which do not constitute private property, are considered as being dependencies of the Crown domain.

Now this legal doctrine, consecrated by both codes, obtained in Canada before and since the Cession. It obtained at the time of the Cession and since, and the British subjects who purchased lands in the Colony had to conform themselves to the local rules then followed with respect to property in Canada: Documents Constitutionels 1759-1791. French version, p. 151, and Vol. A., Seignorial Questions, p. 61 A.

The civil laws in existence at the time of the Cession were

taken to remain and be in force, as long as they were not changed by a declaration of the Sovereign power, whose silence in such cases was interpreted as a tacit confirmation of such existing laws. And indeed it was only by the Union Act of 1840, sec. 54 (3-4 Vict. ch. 35, sec. 54, Imp.) that the control of the sale of, and the administration of lands in Canada were completely abandoned to us by the Imperial Government.

Under the Roman Law navigable waters were not susceptible of individual appropriation, as they were considered as belonging to all men. (Instit. I., liv. II, tit. 1; L. 5, ff De Divis. Rer. Inst. 2 cod. tit.: Daviel, Des Cours d'Eau, Vol. I., p. 27, *et seq.*; Garnier, Régime des Eaux, Vol. I., p. 44.

Proudhon, Domaine Public, Vol. 3, No. 680 *et seq.*, also lays down the well-known principle that navigable rivers are *inalienables et imprescriptibles*, as all other things destined to and for the public usage, and that they are therefore dependencies of the Crown domain within the meaning of art. 400 C.C.. And a grant of navigable waters unless authorized by an Act of Parliament, would be void and convey no right or title. See also Delsol, Civil Code, Vol. I., pp. 431, 435.

Dalloz (1823), I., 371, states that rivers *navigables* or *flottables a trains ou a radeaux* are considered dependencies of the Crown domain. And the very instructive judgment in *Tanguay* v. *The Can. Electric Light Co.*, 40 Can. S.C.R. 1, upon almost a similar point, relies practically on the same principle of law. A long catena of decisions in that direction, as well as text-books, could be here cited in support of this doctrine, but in view of the decision in the *Maclaren* case, the *Tanguay* case, and the decisions of the Seigniorial Court, it becomes unnecessary to mention them here, excepting, however, the decisions of the Seigniorial Court in view of their great weight and authority, to which an almost authoritative sanction has been given by statute, and which, apart from statute, naturally command the highest respect by reason of the composition of the tribunal which pronounced them: 40 Can. S.C.R. 1.

Before the passing of "The Seigniorial Act of 1854," seigniors had no other rights over navigable rivers and streams, than those specially conveyed to them by their grants *provided these rights were not inconsistent*

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*with the public use of the water of those rivers and streams which is inalienable and imprescriptible*: Seigniorial Questions, Vol. A., pp. 68, 130A., 131A. and 132A.

In order to acquire ownership in navigable rivers it is necessary to have an *express* conveyance from the Crown, and it is further necessary, to give validity to such rights, that they should not be contrary to the public usage of these rivers in regard to *navigation and commerce*, which usage is *inalienable and imprescriptible*. *Idem* Vol. A., p. 374 A.

While certain rights may be specifically acquired in navigable waters, no *de plano jure* rights would pass with a conveyance of land which are contrary to the general law in force. Without a special grant of such navigable rivers, no such right or title as that claimed by the suppliants passed in respect of the navigable part of the Gatineau river, which by reason of its navigability becomes part of the Crown domain and is *inalienable and imprescriptible*. Even in certain cases a specific grant over navigable waters might be void: *Oliva* v. *Boissonnault*, Stu. K.B. 524; *Reg.* v. *Patton*, 11 R. Jud. Rev. 394; *Tanguay* v. *Can. Electric Light Co.*, 40 Can. S.C.R. 17; and Coulson & Forbes, The Law of Waters, 3rd ed., pp. 98, 99, 100, 491 and 494.

Great stress is laid by suppliants' counsel upon the case of *The A.-G. of Quebec* v. *Scott*, 34 Can. S.C.R. 614. What was decided in that case, under the very land patent in question in this case, is that Brewery Creek passed with the land mentioned in the patent. But it was there overwhelmingly established that Brewery Creek was neither navigable, nor *flottable a trains ou radeaux*. The judgment in that case states that no one, before the appellant, has ever seriously contended that such a small stream as Brewery Creek, across which a child could throw a stone and which could be crossed on foot and was even dry in certain places during part of the summer was, as a matter of fact, a navigable or floatable river. Therefore, all is said in that judgment must be taken to apply to this creek, and not to apply to a case of a navigable river; and were there any doubt as to the meaning of any general observation on the law found in the judgment, it would stand corrected or rather made clear by the statement at the end of the second paragraph of

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p. 615 of the report where it is stated: "For if it is floatable, its banks are part of the public domain—art. 400, C.C.." In other words, if it is a navigable and floatable river, it comes within the ambit of the legal doctrine to be found in art. 400, C.C. This case of *The A.-G. of Quebec* v. *Scott*, only decided what was decided in the *Maclaren* case, and that is on a river neither navigable nor floatable *a trains ou radeaux*, the owner of the land on each bank extends his ownership *ad medium filum aqua*.

It might seem unnecessary to have considered in the present case the broad question as to whether or not navigable rivers can be alienated; because alone from the above rule of interpretation referred to, found in Chitty's Prerogatives the absence of a specific grant of the river, and the Instructions to Lord Dorchester with respect to the restrictions and reservations under which Crown grants for land were then issued, the question seems absolutely concluded that such navigable rivers could not pass, under the present circumstances, with the grant as worded.

There will be judgment in favour of the respondent, with costs, and the suppliants are adjudged not entitled to the relief sought by their petition of right.

*Judgment accordingly.*

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## PRATT v. IDSARDI.

B. C.
C. A.

*British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher, and McPhillips, JJ.A. June 7, 1915.*

1. MASTER AND SERVANT (§ I C—13)—VOLUNTARY LEAVING OF EMPLOYMENT—JUST CAUSE—INFERIORITY OF FOOD—RIGHT TO WAGES.

Inferiority in the quality of food for which no reasonable opportunity to remedy the complaint is given by the servant to the master does not constitute a just cause for leaving the employment so as to entitle the servant to a recovery of wages for the unexpired term of employment.

2. DAMAGES (§ III A 5—87)—BREACH OF CONTRACT OF EMPLOYMENT—FAILURE TO SEEK OTHER EMPLOYMENT—MITIGATION AGAINST WAGES.

The failure of a servant to seek other employment may be set up in mitigation of damages against a claim for wages for the unexpired term.

[*Andrews* v. *Pac. Coast Coal Mines*, 15 B.C.R. 56, applied.]

Statement

APPEAL from a judgment for plaintiff under a wages contract.

*Kennedy*, for appellant, defendant.

*J. Russell*, for respondent, plaintiff.

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MACDONALD, C.J.A.:—The plaintiffs were employed by the defendant as members of a party making surveys for the Provincial Government in a remote part of Vancouver Island. They were engaged for the season commencing on May 1, and it was calculated that the season would end about the middle of October. The terms of employment were their board, the agreed wages per month, and the fares of the men to the place of their labours and return.

On September 19, the plaintiffs refused to continue their work and voluntarily left the defendant's employment. He offered to pay them their wages up to the time they left work but refused to pay their return fares.

It is conceded by their counsel that if the plaintiffs refused to continue in defendant's employ to the end of the season without just cause for quitting their employment this action cannot be maintained.

The plaintiffs afterwards accepted the amount tendered and have obtained judgment in their favour for their return fares and one month's wages for the balance of the season of their employment.

The defendant's counsel contended that there was a misjoinder of parties and also that the plaintiffs had neglected to offer evidence that they had sought employment to mitigate their damages, but in view of the conclusion I have come to on the merits I need not consider these matters.

Plaintiffs left their employment because of the alleged inferior quality of the food supplied them by the defendant and the manner in which it was cooked, and the alleged lack of cleanliness of the cook.

On the morning of the 19th and without previous notice to defendant, they refused to go to work except on the condition that the defendant would discharge the cook and procure another in his place and as the defendant refused to comply with this demand they left his employment and refused to continue although defendant begged them to do so.

In my opinion, the plaintiffs were not justified even on their own evidence in the course they took. As a Court of re-hearing we have to consider the appeal both on the facts and on the

law. We cannot dismiss it with the observation that the learned Judge below was in a better position than we are to judge of the weight of the evidence or the credibility of the witnesses. The rule which should govern a Court of Appeal in this regard is well established: great weight is to be given to the finding of the trial Judge upon the facts when that finding may be influenced by the conduct and demeanour of the witnesses, but his findings cannot release us from our duty to rehear the case on the facts.

Taking the evidence of the plaintiffs and their witnesses, it will, on analysis, be found to be very unsatisfactory, indeed the inference I would draw from that evidence alone is that the plaintiffs were not justified in quitting the employment. Ward, one of the survey party but not a plaintiff, was called to the witness-box by the plaintiffs' counsel, and put forward by him as "an independent witness." On cross-examination he was obliged to admit "in regard to the quality of the cooking in the main it was all right, the main kick was one about there not being enough of it."

Now, no complaint is made in the pleadings about there not being enough of it, and it was conceded by plaintiffs' counsel on the argument in this appeal that the quantity of food was not in issue in this action. This witness further stated: "As far as I am concerned the porridge and beans sometimes were not cooked up to standard."

Now, the cooking of the porridge and beans is one of the plaintiffs' main grievances. Again the witness said: "Ham, pastries, vegetables, etc., were there up to a fair standard." The bread, butter, coffee, potatoes, bully-beef, dried fruit and many other articles, are admitted by plaintiffs to have been good. With regard to the complaint of uncleanliness of the cook and of the dishes and cooking utensils, assuming that there was some ground of complaint in this connection, I am of opinion after reading the evidence of the plaintiffs and giving it such credence and weight as it deserves in view of its many inconsistences and manifest exaggerations, that this complaint furnishes no just cause for their quitting the employment.

The conduct of the plaintiffs in raiding the cooking tent be-

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fore leaving and pushing aside defendant's wife who happened to be there, causing her to fall, is a circumstance reflecting upon the temper of those participating in it, and does not tend to strengthen belief in their reasonableness.

I would allow the appeal and dismiss the action with costs here and below.

Martin, J.A.

MARTIN, J.A.:—Apart from all other objections the appeal should, in my opinion, be allowed because the plaintiffs were not justified in leaving the defendant's service as they did. Assuming that the food and cooking were not up to what the plaintiffs should reasonably have been entitled to in a camp in that remote locality and in those conditions (which I am very far from assuming on the very unsatisfactory evidence), yet the plaintiffs did not give the defendant reasonable notice and opportunity to remedy complaints, but acted in a hasty, peremptory, and improper manner and in effect terminated their own service in such a way as to give them no further claim upon their employer. The plaintiff Dickson, for example, on p. 87, admits that the defendant had not been notified of the complaints for at least a month before September 18.

Furthermore, and in any event, the judgment could not stand for the full amount giving one month's wages in lieu of notice because the plaintiffs failed to comply with the requirements of our Courts in seeking other employment, as referred to in this Court in *Andrews* v. *Pac. Coast Coal Mines* (1909), 15 B.C.R. 56, at 63-4, and therefore, in any event, the appeal should be allowed and the judgment reduced to the proper amount. But as I take the view that the plaintiffs left their employment without just cause it is unnecessary to pursue this branch, as their whole case fails.

Galliher, J.A.

GALLIHER, J.A.:—In deference to the finding of the learned trial Judge I have carefully read and considered the evidence in this case.

The quality of food is a relative term, for instance one cannot expect the same quality of food in a camp in the wilds of Northern Vancouver Island as they would at a point contiguous to market nor the same neatness and cleanliness in such a camp as in one's private house or in a good restaurant.

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All conditions and circumstances must be taken into consideration, and the evidence of the plaintiffs when sifted down, after all amounts to little more than isolated cases when one item of diet sometimes and a different one at others was somewhat off colour.

On the whole, and considering all the circumstances, there was not, in my opinion, sufficient to justify the plaintiffs leaving in a body as I find they did, seriously hampering the work and in face of the defendant's promise to do what he could to better conditions—a promise which I think the plaintiffs should have given the defendant at least a few days to endeavour to make good.

The appeal should be allowed with costs and the action dismissed with costs.

McPhillips, J.A. McPHILLIPS, J.A.:—I agree with my brother Martin—and that the appeal should be allowed.

*Appeal allowed.*

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## WALCOTT v. WALCOTT.

N. S.
S. C.

*Nova Scotia Supreme Court, Sir Charles Townshend, C.J., Graham, E.J., and Russell, Longley, and Drysdale, JJ. January 2, 1915.*

1. DIVORCE AND SEPARATION (§ II—6)—JURISDICTION—DOMICILE—TRAVELLING SALESMAN—GROUNDS OF ADULTERY.

The residence of a travelling salesman for the period of one year and a month coupled with his affidavit of his intention as to permanent residence does not establish a sufficient change of domicile for jurisdictional purposes in a divorce proceedings on grounds of adultery committed in another province.

Statement APPEAL from the Order of the Judge of the Court for Divorce and Matrimonial Causes, refusing petitioner's application for leave to serve in the province of Ontario a citation and petition for dissolution of marriage.

*J. Terrell*, for petitioner, appellant.

*Nem. con.*

Graham, E.J. GRAHAM, E.J.:—The petitioner made an application in the Court of Divorce and Matrimonial Causes for leave to serve in Ontario a citation and petition for a dissolution of the marriage. It was refused and there is an appeal and the statute requires the Judge to sit in the Court of Appeal.

The petitioner's affidavit on which the application was made is as follows:

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I, Walcott of Halifax, in the county of Halifax, agent, make oath and say as follows:

1. That I reside and have resided in Halifax aforesaid since the month of January, 1913, and have taken up my residence in Halifax aforesaid, with the bona fide intention of residing in Halifax aforesaid permanently.

2. That prior to coming to Halifax I resided at Toronto, in the province of Ontario, with my wife, Walcott, the respondent herein.

3. That as a result of a change in my occupation I decided to take employment in Halifax, and to make my permanent abode here with my said wife, she at the time fully consenting and agreeing to come to Halifax and reside here.

4. With that purpose in view I came to Halifax alone and completed arrangements about my business employment and also made arrangements to establish a home here, and at first sought to purchase a house, but owing to the excessive prices asked for properties I was unable to complete purchase of same, and then made arrangements to rent a house preparatory to bringing my said wife to Halifax to live.

5. That after I made my business arrangements in Halifax, I returned to Toronto, for the purpose of bringing my wife and child to Halifax to reside here permanently.

6. On my return to Toronto my said wife refused to come to Halifax to live unless I allowed her to have W. G., the person mentioned in the petition signed by me here, to come to Halifax and visit us which I refused to do.

7. I made every effort to get my said wife to come to Halifax with me, but failed.

8. That when I first came to Halifax to arrange to engage in business and take up my residence here I knew nothing whatever of the acts of misconduct committed by the said Walcott as set out in said petition with said W. G.

9. That it was not until I returned to Toronto for the purpose of bringing my said wife to Halifax and after I had tried to induce her to come here that I was informed of the conditions as set out in the petition herein.

10. That I was not aware of the fact that there was a Court for Divorce and Matrimonial Causes in the province of Nova Scotia until I had resided in Halifax for some time and then only learned of the fact in a casual way.

11. That I did not take up my residence with the intention of taking proceedings in this Honourable Court with reference to the matters complained of in said petition, but solely for the purpose of engaging in business here and taking up my permanent abode.

12. That I have instructed my solicitor to institute proceedings herein in this Honourable Court to dissolve the marriage between the said Walcott, the above named respondent and myself on the grounds set forth in said petition.

13. That the said Walcott is at present, as I am informed, and verily believe, residing at ——— in the province of Ontario and Dominion of Canada, the same being a place out of the jurisdiction of this Honourable Court.

Sworn to at Halifax in the County of Halifax, this 24th day of February, A.D. 1914. (Sgd.)

Before me

He calls himself "agent" but in his petition he admits that he is a travelling salesman, and during the time the petitioner lived at Toronto, that is, between September, 1907, until he commenced to reside in Halifax, January, 1913, and was, in the course of his employment, "frequently away from home and from respondent."

Now it appears that the parties up to that time, 1913, belonged to Ontario, lived there and were married there. The respondent is not shown to have ever been in this province. There is one child, four years old, and she is living with her mother's father in Ontario, presumably in the custody of the mother. The Court would hesitate to deal with that subject.

The co-respondent lives and practises in Ontario and the alleged adultery took place in Ontario.

Of course the important question is whether the petitioner has changed his domicile to Nova Scotia. If he has not, the Court of Divorce has not jurisdiction. And to show this the affidavit of the petitioner was used.

He says, first, that he has resided since January, 1913, (the affidavit was made February 24th, 1914), in Halifax, that he intends *bona fide* to reside there, and the rest of the affidavit consists of matters which he intended to do and for the most part did not do.

There is a disadvantage about an affidavit stating a man's intention, namely, that if it is not true there is no way of punishing for it. And it is so easy to change one's intention and to do so quickly and it is done so often.

In the Court for Divorce in this province there are two peculiarities: One is that in adultery cases neither party can go into the witness box. Parties always have been disqualified as witnesses, rather they never were qualified, and were expressly excepted when in other Courts of this province they were qualified as witnesses. Second, the scale of fees was framed before 1851, and since the Confederation, 1867, has not, I think, been modified, but the consequence is that a divorce may be obtained for a very small sum—very much smaller indeed than in the parliament of Canada, to which Ontario people have to go if they wish a divorce. There is another peculiarity in common with all Courts of Divorce, namely, that in nine-tenths of the cases, both parties want divorce,

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and the defendants do not defend, so the Judge must watch the interests of the community. The consequence of the disqualification of the petitioner to testify will lead to this result, that if his case comes to a hearing and the changing his domicile to Nova Scotia comes to be proved as it must be proved there to give the Court jurisdiction, he will not have the advantage of proving his intentions. He will not be in the witness box.

In *Wilson* v. *Wilson*, 2 P. & D. 435, Lord Penzance said:—

> Most of the cases of domicile occur after the death of the party and the Court has therefore to infer from the character of the residence in a particular country to which he has removed himself, from the ties he has created for himself, from the property that he has acquired, the obligations that he has entered into in connection with the new country. The Court has to determine the fact that he has really chosen to reside there, as Lord Westbury puts it "for an indefinite period as his home", and if this were a case in which Mr. Wilson were dead and the Court had nothing to go upon but the fact of his residence here and the way in which it arose, I do not think there would be enough to enable the Court to come to a conclusion that he had taken up his domicile in this country.

Then he states the circumstances of that case. There the petitioner could and did go into the witness box and was examined, and I think he had a much stronger case than exists here. For one thing, when the petitioner in Scotland discovered the adultery of his wife in November, 1860, he left Scotland and thenceforward lived with his mother in England until April, 1871, over four years. The head note to the case of *Bell* v. *Kennedy*, 1 Sc. App. 307, is:—

> Per the Lord Chancellor: "The law is beyond all doubt clear with regard to the domicile of birth that the personal status indicated by that term clings and adheres to the subject of it until an actual change is made by which the personal status of another domicile is acquired."

Per Lord Westbury:—

> The domicile of origin adheres until a new domicile is acquired.

Per Lord Chelmsford:—

> The onus of proving a change of domicile is on the party who alleges it.

I refer to the cases cited in the opinion of Ritchie, J., in *Wadsworth* v. *McCord*, 12 Can. S.C.R. 466 at 469, for which authority I am indebted to Mr. Justice Drysdale. I also refer to the case of *Manning* v. *Manning*, L.R. 2 P. 223.

Take the allegation of residence for a year and a month. One asks where was his residence, his hotel or boarding house?

A mere street number would be a help. In which province did the employer of the travelling salesman have his business? For many travelling salesmen a hotel in one province is as good as that in another. The wholesale houses of so many are in other provinces. And was the residence at all continuous or was it like it had been in Ontario in the course of his business. If he only could allege possession of an article of furniture in Nova Scotia! If it had been a longer period before he suspected his wife's guilt and she refused to come to him in Nova Scotia, would he reside here or return to her and his child? I should not like to have it understood in Ontario or the western provinces of Canada, or even in the States, that such a residence as a travelling salesman would have in Nova Scotia during a year and a month coupled with his swearing to an affidavit of his intention to reside here will make out a sufficient case of a change of domicile, and particularly the fact I have hinted at that a divorce can be obtained in Nova Scotia very cheaply. I am not desirous of competing for cases with other Divorce Courts. A person in want of a divorce might put his intention strongly.

One is very helpless where there is no one acting for the respondent and divorce will enable the respondent to marry the paramour speedily. That makes three persons in favour of the divorce, and no one opposing it to assist the Judge.

And besides, if such a marriage should take place and a prosecution for bigamy in Ontario because there was no domicile in Nova Scotia, the Ontario jury might suspect the Court of a small province.

I think there was not made out a *prima facie* case of jurisdiction of the Court and I decided it on that application rather than go on and incur the expense of a hearing when the petitioner could clearly go to parliament in any view. Of course if a *prima facie* case has been made out the petitioner ought to have leave to serve the process in Ontario and have an opportunity afforded him of proving at the hearing in a proper way that there has been a change of domicile.

I think the appeal should be dismissed, and there is this comfort that the petitioner may file another petition, and having now two years to his credit in Nova Scotia, if that has been the case, he will be in a better position to prove his change of domicile.

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DRYSDALE, J.:—The question here is what it is necessary to establish in order that the petitioner may be considered domiciled in Nova Scotia. The most elaborate and satisfactory decision on the subject I find in a decision of the question by the late Sir William Ritchie in *Wadsworth* v. *McCord*, 12 Can. S.C.R. 466. Taking the various authorities reviewed and collected by that learned Chief Justice as a guide on the status of the petitioner as to domicile at the time of the presentation in the Divorce Court here of the petition in this case, I may say that I quite agree with the conclusion arrived at by the learned Judge in the Divorce Court. There really were no facts presented worthy of consideration as tending to prove a change of domicile except the statement made by the petitioner in his affidavit as to his intentions in coming to Halifax to reside. It is clear that there must be established both residence here as a home and intention. There is really nothing presented here to establish domicile in Halifax but the petitioner's intention. This could not avail him at the trial because he cannot himself be a witness. But assuming at this stage his affidavit can be considered there is practically nothing before us but his intention other than what is quite consistent with a temporary home. As to residence with a view to establish a change of domicile it has always been considered that length of time will not alone do it. Intention alone will not do, but the two taken together may work a change.

I cannot find anything in the case as presented that in my opinion justifies any interference with the conclusion arrived at below.

I would dismiss the appeal.

Sir Charles Townshend, C.J.

SIR CHARLES TOWNSHEND, C.J., concurred with GRAHAM, E.J., and DRYSDALE, J.

Russell, J., and Longley, J., (dissenting).

RUSSELL and LONGLEY, JJ., dissented.

*Appeal dismissed.*

ALTA.

S. C.

## PRICE v. INTERNATIONAL HARVESTER CO.

*Alberta Supreme Court, Walsh, J. May 8, 1915.*

1. DAMAGES (§ III P 1—333)—DEFECTIVE INSTALLATION OF BINDER—LOSS OF CROP—REMOTENESS.

The destruction of a crop resulting from the delay in harvesting it because of physical disability occasioned by an improper setting up of a binder is too remote an element of damage to be considered in an action against the seller of such machine.

[*Walton* v. *Ferguson*, 19 D.L.R. 816, followed.]

ACTION for damages for injuries sustained.

*G. H. Ross*, K.C., and *J. T. Shaw*, for plaintiff.

*A. H. Clarke*, K.C., and *F. S. Albright*, for defendant.

WALSH, J.:—This action was tried by me with a jury. The plaintiff bought a binder from the defendant, which, according to the findings of the jury, was not properly set up by the defendant, upon whom that duty rested. As a result of this, when the plaintiff started to use the machine, he was thrown from it, sustaining injuries which prevented him, for about a month, from doing any work. Amongst other items of damage claimed by him, is one for the partial destruction of his crop. He was starting to cut it when this accident occurred, and he says that but for it he could have cut it all. He did what he could to get others to cut it but did not entirely succeed. His brothers did cut some of it, but a heavy snow storm which came up, after the time when, but for his accident, he would have had it all cut, made it impossible to save the rest. I reserved for consideration the question as to whether or not his damages under this head are recoverable. I submitted to the jury a question as to the amount of the damage sustained from this cause by the plaintiff under instructions which directed them to take into account the weather uncertainties, the possibility of the plaintiff, by proper exertions being able to have saved all or more of the crop than he did, and such other questions along these lines as appeared to me to enter into the matter. They found in answer to this question that the plaintiff had sustained damage on this count to the amount of $1,062.61. I must now decide whether or not the plaintiff is entitled to this sum in addition to the amounts awarded him by the jury.

The defendant contends that this damage is too remote for recovery. Ever since *Hadley* v. *Baxendale*, 23 L.J. Ex. 179, the rule has been that the damages recoverable in such an action as this are those which arise naturally and directly from the breach of contract or such as the parties might reasonably have expected to result from it. It is difficult for me to think that the parties ever contemplated the possibility of such a thing happening as has happened here. If they did they would un-

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doubtedly recognize the element of personal danger to the plaintiff in it but it does not seem reasonable to think that they would expect that his crop would be damaged in consequence if the plaintiff was disabled. The natural thing to expect would be that it would be cut by another man. That, however, is a most unsatisfactory test to apply to this case. The proper one, I think is the other branch of the rule, that is whether or not this damage flows as it is put by Lord Herschell in *The Argentino*, 14 A.C. 519, at 523, "directly and naturally or in the ordinary course of things from the wrongful act."

The physical disability of the plaintiff was a direct result of this accident. That made it impossible for him to personally harvest his crop as he otherwise would have done. The natural and ordinary thing for him to do under these circumstances was to hire some one to do his work for him. If he had been able to save his crop in this way his only damage under this head would have been the expense of it to him, beyond that which he would have been under if he had not been disabled. That expense he could have recovered from the defendant, for it would have been incurred as a necessary result of the defendant's wrongful act. As a matter of fact he is recovering under the verdict of the jury the amount actually paid by him for wages in the harvesting of that part of the crop which was saved and as to that there is no objection. But the claim for the crop that was destroyed is carrying the matter a step further. This loss certainly grew out of the cause of action, but that is not the whole question. Did it naturally or immediately result from it or did it grow out of some intervening cause such as the inability of the plaintiff to secure the needed help?

Cockburn, C.J., in *Hobbs* v. *London and South Western Railway Co.*, L.R. 10 Q.B. 111, at 117, says:—

> You must have something immediately flowing out of the breach of contract complained of, something immediately connected with it and not merely connected with it through a series of causes intervening between the immediate consequence of the breach of contract and the damage or injury complained of.

This same idea of intervening causes runs through all the cases. In volume 10 of Halsbury's Laws of England, at page 319, it is stated that it is only when damages are not the proxi-

mate or immediate result of the act complained of but of some intervening cause that they are properly described as too remote.

The vague rule which governs the matter has been described by Bramwell, B., as something like having to draw a line between night and day, there being a great duration of twilight when it is neither night or day, and a very apt description it is. Applying it to the facts of this case in the light of many authorities which I have read with great care, I am reluctantly forced to the conclusion that these damages are too remote for recovery inasmuch as they were neither reasonably within the contemplation of the parties as a likely result of the breach of the contract, nor are they the immediate and natural consequence of the defendant's failure to properly set up the machine.

In reaching this conclusion I am following the view to which I gave effect in *Walton* v. *Ferguson*, 19 D.L.R. 816. The breach there complained of was the complete failure to supply the machine contracted for so that the work intended to be done with it was left undone entirely, while here the breach was the failure to deliver in fit condition so that a part of the contemplated work was as a result not done. The same rule governs both cases and I do not think that any distinction can be made between them in the application of it.

*Judgment accordingly.*

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## FERRIE v. MEIKLE.

SASK.
S. C.

*Saskatchewan Supreme Court, Haultain, C.J., Newlands, and McKay, JJ. March 20, 1915.*

1. SALE (§ III D—75)—RIGHTS OF BONA FIDE PURCHASERS—INVALID REGISTRATION OF LIEN NOTE.

A purchaser in good faith for valuable consideration obtains title to the chattel which was the subject of the sale although he had notice that the seller had given a lien note at the time that such seller bought the chattel, if such lien note was not registered as required by the Conditional Sales Act, Sask., which provides that the seller shall not be permitted to set up a right of property or right of possession under the unregistered lien note as against the sub-purchaser from the party to whom he gave possession under a conditional sale.

[*Moffatt* v. *Coulson*, 19 U.C.Q.B. 341; *Roff* v. *Krecker*, 8 Man. L.R. 230, applied.]

APPEAL from a judgment of the trial Judge in an action for the conversion of horses. Statement

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FERRIS v. MEIKLE.

Newlands, J.

*G. A. W. Braithwaite*, for appellant.

*B. D. Hogarth*, for respondents.

The judgment of the Court was delivered by

NEWLANDS, J.:—This is an action for the conversion of two horses by defendants. The defendant, John Meikle, took the horses in question out of the possession of the plaintiff by virtue of two lien notes, one for each horse, and he sold them to the defendant, Percy G. Meikle, and at the commencement of this action they were in the possession of the latter though he sold them before the trial. The lien notes in question contained no proper description of the horses and were not registered as required by the Act respecting lien notes. The plaintiff at the time he or his partner bought the horses had notice of the existence of John Meikle's lien, and the trial Judge found that having notice of the lien, he was not a purchaser in good faith within the meaning of the above Act. He cites as authority for this proposition *King* v. *Kuhn*, 4 Man. L.R. 413. As this case was over-ruled by the Court of Queen's Bench in Manitoba sitting *en banc* in *Roff* v. *Krecker*, 8 Man. L.R. 230, it is not now any authority for the proposition mentioned. In *Roff* v. *Krecker*, Taylor, C.J., reviews all the authorities both in England and Ontario, upon statutes using similar language. At p. 239 he says:—

> If the mortgage was taken for a fair consideration, and not for a collusive purpose, the plaintiff is undoubtedly under the ruling of Robinson, C.J., in *Moffatt* v. *Coulson* (19 U.C.Q.B. 341) a mortgagee in good faith. It was said in *Vane* v. *Vane*, L.R. 8, Ch. 383, 399, a *bona fide* purchaser means "that the purchaser should be really a purchaser and not merely a donee taking a gift under the form of a purchase." It seems to me that under the authorities, the plaintiff being a purchaser in good faith for valuable consideration, his having had notice of the defendant's prior but unfiled mortgage is not material, and he is entitled to the protection of the statute.

It is not disputed in this case that the plaintiff or his partner actually bought the horses in question from Kane, to whom defendant, John Meikle, had sold them, and paid valuable consideration for them.

Now, as plaintiff was a purchaser in good faith for valuable consideration is he protected by the Act? The Act respecting lien notes differs from the Act respecting chattel mortgages in that the latter Act makes void against the subsequent purchaser the unregistered chattel mortgage, while the former Act provides that the seller shall not be permitted to set up any such right of

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property or right of possession as against the purchaser unless the lien note is registered. I do not see that the different wording of these two statutes makes any material difference in their effect. The defendants in this case can only justify the taking and keeping of the horses in question under the lien notes and if they cannot set up this defence against the plaintiff on account of the notes not being registered, then they have no defence to the plaintiff's action, and the effect is the same as if the statute had rendered the notes void.

I am therefore of the opinion that the plaintiff was a purchaser in good faith for valuable consideration of the horses in question and that defendants have no defence to his action.

Plaintiff is therefore entitled to recover and the appeal should therefore be allowed with costs.

As the horses have been sold by defendants plaintiff should have judgment for their value, which I would fix at $225 and in addition $25 damages together with the costs of the trial and of the appeal.

*Appeal allowed.*

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ALTA.

S. C.

## PAITSON v. ROWAN.

*Alberta Supreme Court, Stuart, J. May 17, 1915.*

1. COSTS (§ I—14)—SECURITY FOR—DOUBLE ACTIONS — SUITS AGAINST PRINCIPAL AND AGENT.

A plaintiff who has taken action and recovered judgment against the maker of a promissory note given for the price of a chattel should not be ordered to give security for costs under Alberta Rule 9 (*c*) in a future action against the undisclosed principals of the maker of the note for the price of the chattel, the second action not being one for the same cause as the first.

[*Caswell* v. *Murray*, 18 C.L.J. 76; *Brunsden* v. *Humphrey*, 14 Q.B.D. 141, referred to. Compare Ontario Rule 373 (*c*), 1913.]

Statement

APPEAL from an order of the Master refusing security for costs.

*A. B. Hogg*, for plaintiff.

*W. S. Morris*, for defendants.

Stuart, J.

STUART, J.:—This is an appeal of the defendants from an order of the Master refusing security for costs. The application was based upon R. number 9 (*c*) of the rules in regard to costs which says that:—

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Stuart, J.

> Security for costs may be ordered . . . where the plaintiff has brought another action or proceeding for the same cause which is pending in Alberta or in any other jurisdiction.

This rule is copied from R. 373 (*c*) of the Ontario Rules, 1913.

It appears that the plaintiff had begun an action against one Murphy upon two promissory notes which were given for the price of an automobile and had recovered judgment thereon. During the course of that action it appears that the plaintiff had discovered circumstances which led him to believe that in purchasing the automobile Murphy was acting as agent for the present defendants, and not having received satisfaction of his judgment against Murphy the plaintiff now seeks to recover the price of the automobile from these defendants as being undisclosed principals.

It is contended that the rule as to security for costs above quoted applies in such a case, but with this I am unable to agree. A reference to *Dean* v. *Lamprey*, 2 Ch. Ch. (Ont.) 202, shews that the rule is an old one in Ontario originating in a statute of 1867.

In Holmested and Langton, 4th ed., p. 880, the cases are collected which bear upon the rule. In every one of them the second action was against the same defendant or his representatives and some of the cases, particularly *Caswell* v. *Murray*, 18 C.L.J. 76, and *Brunsden* v. *Humphrey*, 14 Q.B.D. 141, shew how narrowly the rule is construed. In the latter case an action for damages to the plaintiff's cab due to a collision was held to be based on a different cause of action from the cause of action where damages were afterwards sought for an injury to the plaintiff's person suffered by reason of the same collision.

In the present case Murphy's obligation to pay and his failure to do so was certainly a different cause of action from the present defendants' obligation to pay, if there is one, and then failure to do so. The appeal is dismissed with costs.

*Appeal dismissed.*

## DUTKA v. BANKHEAD MINES Ltd.

ALTA.

S. C.

*Alberta Supreme Court, Harvey, C.J., Scott, and Beck, JJ. June 25, 1915.*

1. MASTER AND SERVANT (§ V—340)—WORKMEN'S COMPENSATION—REDEMPTION OF WEEKLY PAYMENTS—MODE OF ASCERTAINMENT.

In estimating the total amount of compensation to be awarded in redemption of future weekly payments under the Workmen's Compensation Act, the amount should be based on the state of health and the probable expectation of life of the injured person at the time of the enquiry on the application for redemption, without any deduction of the antecedent payments, though agreed upon by counsel of the respective parties.

[*Victor Mills, Ltd.* v. *Shackleton*, [1912] 1 K.B. 22, followed.]

Statement

APPEAL from the judgment of Carpenter, D.C.J.

*L. H. Fenerty*, for appellant.

*O. M. Biggar*, K.C., for respondent.

Beck, J.

The judgment of the Court was delivered by

BECK, J.:—This is an appeal from the award of his Honour Judge Carpenter, under the Workmen's Compensation Act, dated February 24, 1915.

On December 26, 1912, an award was made for the payment by the respondents to the applicant for $6 a week as compensation for personal injuries. Payment was made accordingly up to February 28, 1914.

About this time the solicitor for the applicant came to an agreement with the respondent for the payment of a lump sum of $729.65 in redemption of the future weekly payments, but an application to have the agreement registered under the Act was refused.

On January 5, 1915, the respondent applied to the District Court Judge to have the amount required to redeem their liability for payment of the weekly compensation fixed by the District Court Judge. It is from his award on the latter application that the present appeal is taken.

The learned Judge fixed the amount to be paid in redemption at the sum of $729.65, the amount fixed by the solicitors' agreement less the sum of $364, part of which has been paid up to the date of the agreement and part of which has been collected under an execution in the meantime.

It is obvious that the learned Judge took the ineffective agreement of the applicant's solicitor made about a year pre-

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viously as the basis of his estimate of the proper sum to be paid in redemption of the compensation.

In so doing he was undoubtedly wrong. In *Victor Mills, Ltd.* v. *Shackleton*, [1912] 1 K.B. 22, the Court of Appeal held that it was with reference to the moment of enquiry into the amount of the redemption money for the then future payments of the compensation that the condition and circumstances of the injured person must be considered. The reason for this is made quite clear by all the Judges of the Court. Farwell, L.J., said:

> The County Court Judge has to ascertain the redemption value or in other words the purchase price of a fixed annual amount, the amount as the sum awarded; and then the Judge has to find something by which to multiply it. He considers the probability of recovery, but it must be six months after the accident, so that the injury is apparently likely to be permanent; but it may not be. The Judge therefore considers the probability of the man's being able to work again, either wholly or partially. He must consider the man's age and his state of health, so as to ascertain his expectation of life. What the employers have already paid appears to me to be absolutely irrelevant. The accident was in 1906. The award was in January, 1911. Supposing there had been redemption in 1906, there would have been five years more by which to multiply the amount of the award, having regard to the expectation of life; but now he has to consider the expectation of life as from January, 1911. I fail to see what the antecedent payments, or what would have been the sum for redemption five years ago, have got to do with it.

The matter should be referred back for the ascertainment of the amount to be paid for redemption on the principle above indicated.

The appellant should have his costs of the appeal and there should be an order for restitution of the amount of the costs awarded below to the respondents and paid to them by the appellant.

*Appeal allowed.*

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MAN.

K. B.

## NORTH WYOMING v. BUTLER.

*Manitoba King's Bench, Galt, J. March 27, 1915.*

1. CORPORATIONS AND COMPANIES (§ VII C—376)—FOREIGN LAND COMPANY—ACTION BY—SPECIFIC PERFORMANCE—R.S.M. 1913, PART 4, CH. 35.

A foreign corporation not licensed to hold lands within Manitoba under R.S.M. 1913, Pt. IV., cannot maintain an action in that province for specific performance of an agreement to exchange lands in the foreign jurisdiction for lands in Manitoba; the action may be dismissed on a summary application under Manitoba Rule 639.

[*Empire Cream Separator Co.* v. *Maritime Dairy Co.*, 38 N.B.R. 309, followed; *Euclid Avenue Trusts Co.* v. *Hohs*, 24 O.L.R. 447, distinguished.]

APPEAL from an order of a Co.C.J., dismissing an application.

*W. P. Fillmore*, for appellant.

*W. C. Hamilton*, for respondent.

GALT, J.:—This is an appeal from an order made by His Honour Judge Locke, dismissing an application on behalf of the defendants for a stay of proceedings. The application is based upon an allegation that the plaintiff is a foreign corporation which has not obtained a license within Manitoba, and is therefore disentitled to acquire or hold the lands in question. The plaintiffs are a company incorporated under the laws of the State of Wyoming, one of the United States of America; the defendants reside in the State of Nebraska, but own certain lands in Manitoba.

The statement of claim alleges that under a series of agreements, concluded in January, 1914, the defendants agreed to purchase from the plaintiff certain lands in the State of Wyoming, and to pay therefor the price or sum of $48,000, part thereof $33,200 to be paid in money to be secured by a mortgage back to the plaintiffs on the Wyoming lands, and the balance $14,800, by the defendants giving to the plaintiffs in exchange certain lands in the Province of Manitoba, containing 400 acres or thereabouts. The plaintiffs claim specific performance of the said agreement and possession of the said Canadian lands, etc.

The defendants deny practically all the allegations in the statement of claim, and they say (par. 22):—

> The plaintiff is a foreign corporation and has not obtained a license in this province required by Part 4, ch. 35, R.S.M. 1913, and is not capable of holding or acquiring land in this province or of maintaining this action.

On February 8, 1915, a notice of motion was served by the defendants upon the plaintiff for an order that all proceedings herein be stayed on the ground, amongst others, that the plaintiff company has not obtained a license in this province as required by Part 4, ch. 35, R.S.M. 1913.

The only affidavit filed in support of the motion is one by William Parker Fillmore, a member of the firm of defendants' solicitors. He states:—

> That I have searched at the office of the Provincial Secretary for the Province of Manitoba, and I find and say that the plaintiff has not obtained a license in this province as required by Part 4 of ch. 35, R.S.M. 1913.
>
> 3. That the plaintiff company is a foreign corporation within the meaning of the said Act.

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In answer to the motion an affidavit by William Tracy Alden, secretary of the plaintiff company, was read, in which he says:—

2. The plaintiff company has not carried on in Manitoba any part of its business. This action is not brought in respect of any contract made in whole or in part within Manitoba in the course of or in connection with business carried on contrary to sec. 118 of the Companies Act.

The plaintiff company apparently takes the position that so long as it cannot be proved to be carrying on business within Manitoba it does not require a license; but sec. 119 of the Act provides that:—

No company, corporation or other institution not incorporated under the provisions of the statutes of this province shall be capable of taking, holding or acquiring any real estate within this province unless under license issued under any statute of this province in that behalf.

It is quite manifest from the material before me which was also before the County Court Judge that the plaintiff company has not taken out a license. It is also clear from the statement of claim that it asks the Court's assistance to enable it to acquire and hold real estate in Manitoba. The plaintiff has no *locus standi* for any such purpose.

The notice of motion which was served upon the plaintiff's solicitor is dated February 8, 1915, and it distinctly points out the objection in question. Ample time has elapsed within which the plaintiff might have removed the objection by discontinuing the action, procuring a license, and starting afresh, but it has not done so. The question is whether the defendant is entitled, upon a summary application, to an order staying the action, pursuant to his original notice of motion, or dismissing it, as he now asks in his notice of appeal, and subsequent notice of motion.

Mr. Hamilton, in supporting the order, relied strongly on the case of *Euclid Ave. Trusts Co.* v. *Hohs*, 23 O.L.R. 377, affirmed in appeal, 24 O.L.R. 447. There the action was brought for possession of certain lands in the City of Toronto, upon a mortgage made by the defendants, and it appeared that the plaintiffs were a banking corporation and were not authorized to take security beyond the State. It was therefore argued that the mortgage was void. A further point was taken that the plaintiffs had not taken out a license to do business in Ontario until after the date of the mortgage and after action brought. In delivering the judgment of the Divisional Court, Clute, J., says, at p. 387:—

The general rule as to the power of a corporation to hold land is stated in 10 Cyc. 1133 as follows: "The limitations imposed by the principles of the common and the statute law upon the power of corporations to hold land, as elsewhere explained in this article, are greatly modified by a principle of extensive application now to be considered, which is that although a corporation may be disabled or forbidden from holding land at all, or from holding land except for particular purposes, or from holding land beyond a prescribed limit, yet if it does hold land in the face of such disabilities or prohibitions, its title will be good except as against the State alone, and that it will be deemed to have a good title until its title is invalidated in a direct proceeding instituted by the State for that purpose." On p. 1135, it is said: "This principle has no application where the corporation is seeking aid of a court of justice to enable it to acquire lands which it has no power to acquire and hold. Here the principle is that a court of justice will not aid a corporation to do that which is impliedly forbidden by its charter or by the law."

It will be observed in the present case that the plaintiffs do not ask to have their title perfected; they claim to have a good title as against all persons excepting the Crown by office found; and what they ask is possession.

Here the plaintiff company is seeking the aid of our Court to enable it to acquire lands which it has no power to acquire or hold in contravention of the statute law of the province.

It was also argued on behalf of the plaintiff that this defence based upon non-compliance with the Companies Act, could not be taken advantage of on a summary application, but must go down to trial. This question came pointedly before the Supreme Court of New Brunswick in the *Empire Cream Separator Co.* v. *Maritime Dairy Co.*, 38 N.B.R. 309, where it was held that a writ of summons issued by an unlicensed extra-provincial corporation on a contract made in part within New Brunswick contrary to secs. 12 and 18 of the Act respecting the imposition of certain taxes on certain incorporated companies and associations may be set aside on summary application. It would seem a hardship that a defendant should be compelled to litigate an action down to trial, with the usual expensive examinations for discovery or commissions to take evidence in the United States, and counsel fees at trial, when there exists an objection to the plaintiff's right of action clearly defined and not open to disputatious evidence.

Our r. 639 provides that:—

> Any party to an action may at any stage thereof apply to the court or a judge for such order as he may, upon any admissions of fact in the pleadings, or in the examination of any other party, be entitled to; and it shall not be necessary to wait for the determination of any other question between

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the parties; or he may so apply where the only evidence consists of documents and such affidavits as are necessary to prove their execution or identity without the necessity of any cross-examination; or he may so apply where infants are concerned, and evidence is necessary so far only as they are concerned for the purpose of proving facts which are not disputed.

I think the language of our rule is wide enough to enable the Court or a Judge to give the defendants summary relief from an action which the plaintiff had no right to bring.

For these reasons, the defendants' appeal is allowed and the action dismissed with costs, including the costs of this appeal.

*Appeal allowed.*

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N. S.

S. C.

## REX v. COADY.

*Nova Scotia Supreme Court, Sir Charles Townshend, C.J., Graham, E.J., and Russell, Longley and Drysdale, JJ. January 2, 1915.*

1. JUSTICE OF THE PEACE (§ III—13)—JURISDICTION—N.S. TEMPERANCE ACT.

Two justices of the peace appointed for the entire county and holding a session at the police office established in an incorporated town within the county under the Towns Incorporation Act, N.S., have concurrent jurisdiction with the stipendiary magistrate of the town to try a charge of selling intoxicating liquor in contravention of the Nova Scotia Temperance Act, 1910.

[*R.* v. *Giovanetti*, 5 Can. Cr. Cas. 157, 34 N.S.R. 505, referred to.]

Statement

APPEAL from a judgment of a County Court Judge.

*D. McNeil*, K.C., for appellant.

*W. F. O'Connor*, K.C., for respondent.

The judgment of the Court was delivered by

Russell, J.

RUSSELL, J.—The question raised by this appeal is whether the jurisdiction is given by the N.S. Temperance Act, 1910 (ch. 2 of 1910), to two justices of the peace to try an information for violation of the Act within the town of Inverness, which was incorporated under the provisions of the Towns Incorporation Act. In the case of *Rex* v. *Giovanetti*, 5 Can. Cr. Cas. 157, 34 N.S.R. 505, it was held that a county stipendiary could convict for such offences in the town of Sydney, there being no exclusive jurisdiction given to the stipendiary for the town, as had been contended in that case. The Act relating to the appointment of stipendiary magistrates, ch. 33, R.S.N.S., was afterwards amended by ch. 11 of the Acts of 1905 by substituting the word "municipality" for "county," so that the stipendiary magistrates should thereafter be appointed not for counties but for muni-

cipalities, but no such amendment was made with reference to justices of the peace. They still continue to be appointed for counties as they have always been.

The N.S. Temperance Act, 1910, enacts, sec. 35, that any prosecution under the Act (or "this part") may be brought before any magistrate having jurisdiction where the offence was committed, and "magistrate" is by sec. 2 (*d*) defined to mean a "stipendiary magistrate or two justices of the peace."

It is contended that exclusive jurisdiction is conferred upon the town stipendiary by sec. 233 of the Towns Incorporation Act, which provides that there shall be in the town a police office to be established by the town council "where all police business of the town shall be transacted," and (sec. 234) the stipendiary magistrate is required to attend there daily or at such times as are necessary for the disposal of business, etc.

I do not think that these words are apt for the purpose of conferring an exclusive jurisdiction. The only question that could be raised under the section would be what I should incline to consider a very frivolous one, whether it was obligatory upon the justices to hold their court in the town office or whether this requirement was in some way limited to some particular kinds of business, or whether it was not merely directory. In any case, the words obviously refer to the place where the business is to be transacted and not to the functionaries by whom the jurisdiction is to be exercised.

For these reasons I think that the conviction was valid and must be affirmed.

*Conviction affirmed.*

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## IRWIN v. CAMPBELL.

CAN.
S. C.

*Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Davies, Idington, Duff, and Anglin, JJ. May 18, 1915.*

1. LANDLORD AND TENANT (§ III A—47)—PAYMENT FOR BUILDINGS—MODE OF VALUATION.

Covenants contained in separate leases on adjoining lots providing the payment for the improvements thereon by the lessor upon the expiration of each lease, in an amount ascertained by valuators, does not authorize a valuation of the improvements on the several lots as an entirety, but the value must be ascertained of the improvements on each lot separately.

[*Campbell* v. *Irwin*, 32 O.L.R. reversed.]

CAN.

S. C.

IRWIN v. CAMPBELL.

2. ARBITRATION (§ III—16)—VALIDITY OF AWARD—IMPROPER VALUATION.

An award by valuators, defective because based on a valuation of several lots as an entirety instead of ascertaining the value on each lot separately, does not warrant a dismissal of the action, but that the same or other valuators should be appointed to ascertain the value in a proper manner.

[*Cameron* v. *Cuddy*, 13 D.L.R. 757, [1914] A.C. 651, followed; *Campbell* v. *Irwin*, 32 O.L.R. 48, reversed.]

Statement

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario, 32 O.L.R. 48.

*Rowell*, K.C., and *George Kerr*, for respondent.

Sir Charles Fitzpatrick, C.J.

SIR CHARLES FITZPATRICK:—I concur with MR. JUSTICE IDINGTON.

Idington, J.

IDINGTON, J.:—This is an action brought upon two covenants in two separate leases of which respondent is the assignee. The covenant in each was as follows:—

> And the lessor shall pay or cause to be paid to the lessee the amount so found to be proper to be paid for the said buildings not less than two months before the end of the then expiring term, and in the event of the said value of the said buildings not being paid as aforesaid within the time limited as aforesaid, or in the event of the lessor not having given six month's notice in writing as aforesaid of his desire that no further term should be granted, and of the lessee having given, five months' previous to the end of the term hereby granted, notice in writing of his desire that such further term should be granted, it is hereby agreed that the lessee shall be entitled to a renewal of the lease of the said premises for a further term of twenty-one years to be computed from the expiry of the previous term, at the annual rent which shall have been ascertained by the valuators as aforesaid as the proper sum to be paid as the ground rent of the said premises for the following term of twenty-one years, if such term should be granted.

Each lease had provided by what preceded said covenant that the lessor might give notice of his desire instead of renewal of lease to terminate at the end of the term the relationship of landlord and tenant and then the value of the buildings on the property leased should be valued by a board of valuators. It is in respect of such value of buildings to be so determined that the foregoing covenant was entered into.

Due notice was given under each of said leases by appellant, the representative of the estate of the original lessor, and a board was duly constituted under each lease. That board was composed of the same men in each case, but the proceedings to

constitute the board had of necessity to be separate and independent.

The lessor held each parcel covered by said leases under leases from two different estates and his leases had similar though not identical provisions relative to the termination thereof and of repayment for buildings. Every consideration, therefore, bearing upon the questions involved herein, required that though the board might be composed of the same men yet the proceedings under each lease here in question should have been carefully preserved independent of each other.

By some remarkable oversight this was not done by the board of valuators, but an award was made by them that treated these separate properties, independent in origin and the personalities concerned therein, as if they had always been one whole. And one sum of $35,000 was found by said award.

It so happened that at the time when it became necessary to proceed, the persons interested as lessor and lessee respectively of each were the same. But that was not any justification for departing from the frame of the separate notices and other proceedings separating what the board (or rather boards composed of same men) were constituted to determine. Had they found separate values and sums due in respect of the buildings upon each parcel and then added them together there might, seeing the party to pay and the party to receive were same, have been no insurmountable objection to the award.

But as it stands there clearly was on the face of it no separate valuation upon which the covenant could operate and an action thereon be founded. And the evidence adduced at the trial of this action puts beyond doubt not only the fact that there was none, but also that the valuators entirely misconceived their duty in the premises.

It seems they had from the beginning so misconceived the purpose of their appointment that they opened their proceedings on the assumption that they were arbitrators and as such had to hear evidence and determine accordingly. They were, after a remonstrance by appellant's counsel and discussion of an hour or two, persuaded that such was not the case and that they must act as valuators only.

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Idington, J.

One if not more of them frankly admitted he was not qualified by personal knowledge to discharge such duty. Explanations were given them that they had a right to become informed in such a way as they deemed best.

In the course of this discussion they and others concerned allege that the counsel who had appeared for appellant to explain that they must act as valuators and not as arbitrators, led them to believe they could award a lump sum including both the buildings held under each lease. Even if that were so it cannot bind appellant. He denies this so alleged, and adds he had no authority to do any such thing. And in this latter regard he stands uncontradicted.

No attempt is made to prove such authority, but it is argued he was counsel for the appellant and hence must be held to have had implied authority.

Inasmuch as there was no trial, no judicial proceedings, in which counsel could act as such, the argument seems idle. And even if there had been such a judicial proceeding, counsel could have no implied authority to do any such thing. If it were a mere matter of procedure in such a case counsel might have been held to have implied authority relative to the scope thereof. But it is not matter of procedure. It is a most material substantive right appellant had to be dealt with upon the lines laid down in each of the separate notices under and pursuant to which the valuators were bound to act. They had no power beyond. Nor could they have acquired it except by some binding agreement between the parties fixing or blending into a new consolidated covenant the two independent covenants and the rights arising thereunder.

All this seems so clear as matter of law that I do not think the board correctly understood what counsel said and what they were about or they would at once have insisted upon his filing with them a consent by appellant to such a departure from the terms of their two respective appointments.

The advantages for the appellant in keeping the two things separate were so obvious that I cannot impute to any lawyer acting for the appellant his intentionally surrendering such advantage.

The buildings had been erected under a system of leasing such as adopted and were the separate results of different leases and rights in relation thereto. The buildings had not, as I understand it, been all built at the same time. But by reason of being on adjoining lands they were made in fact to form and to be used as a whole. That was a mere accident which so long as held by same party might secure a more profitable use than if kept separate. That advantage the occupying tenant could rightfully enjoy during the concurrence of the terms and do no injury to the lessor. But at or within a few days of the end of each of the terms, which were approximately but not identically the same, the appellant's right in one of these parcels ceased. All she could ask from her landlord was to be compensated for the buildings thereon without any such advantage or augmented value incidentally flowing from such antecedent concurrence.

If, as suggested or hinted at in argument, she by some one else's stupidity, escaped the observation of this, and gained thereby, we have nothing to do therewith.

Again there was an agreement come to during the proceedings and reduced to writing whereby the valuators were fully relieved from the burden of the other part of the inquiry for which they were appointed and by which they were to determine what would be a proper rental in case of renewal.

If there had as alleged been in fact any further waiver or limitation of the duties to be discharged by the board it in all probability would have formed part of that writing. But it did not.

And the insurmountable reply of the appellant to the respondent and to the members of the board is that the written award does not in its recitals pretend to allege any such thing as now set up but proceeds on the original notices; if that is what it means.

But does it mean that? Indeed it reads or may be read as if founded only upon one notice. If that was what was present to the valuators' minds and they in truth had forgotten that there were two different sets of notices and appointments then the whole business has miscarried. In that event clearly there have not been any such valuations as the appointing notices required.

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In any way one can look at it there seems no escape from the conclusion that there never was such a valuation and finding within the requirements of either covenant as to entitle a recovery thereon.

Such a finding and valuation is a condition precedent to the covenant having any operative effect herein unless alternatively in the way I am about to point out as applicable to such a failure of purpose as is apparent.

I need not therefore enter upon the undesirable features of the case as presented and argued at length. I may be permitted, however, to point out that this is the third or fourth case where we have recently had to consider the duties of valuators, and this is not the first in which suspicions were cast, in argument, upon the manner of conducting the proceedings arising from indiscretion on the part of some of those concerned therein.

It is unpleasant to have to deal with such features. To palliate or excuse them tends to lead others to go and do likewise and to needlessly fix blame upon any one by pointing out wherein he has been indiscreet is not desirable. I, therefore, abstain from saying more than is prompted by what the experience of what has transpired in other cases as well as herein and that is that valuators should not listen to one party, or any one acting on his behalf or under him, unless the other is present or is consenting thereto, and it would be safer to keep away from having anything to do with either of such parties pending the inquiry and until the award is signed or otherwise openly declared to both parties.

And when valuators are sworn as they were here, I submit, with great respect, none of them can properly be treated as managing or acting for him who has appointed him or them.

This appeal should be allowed without costs to either party throughout except the costs of the proceedings up to trial so far as same usefully served the purpose of presenting plaintiff's claim.

But instead of dismissing the action the judgment should be so framed, in accordance with the principle proceeded upon by the Judicial Committee of the Privy Council in the case of *Cameron* v. *Cuddy*, 13 D.L.R. 757, as to have the value of the

buildings in question under each lease determined by a referee to be named by this Court or by the Court below, unless the parties desire that the same board as originally constituted should proceed to do so.

It seems to me having regard to the facts in said case the paragraph therein, at p. 656, covers this, as follows:—

> When an arbitration for any reason becomes abortive it is the duty of a Court of law, in working out a contract of which such an arbitration is part of the practical machinery, to supply the defect which has occurred. It is the privilege of a Court in such circumstances and it is its duty to come to the assistance of parties by the removal of the impasse and the extrication of their rights. This rule is in truth founded upon the soundest principle, it is practical in its character, and it furnishes by an appeal to a Court of justice the means of working out and of preventing the defeat of bargains between parties. It is unnecessary to cite authority on the subject, but the judgment of Lord Watson in *Hamlyn & Co. v. Talisker Distillery*, [1894] A.C. 202, might be referred to.

That case in which this language is used is alleged to have involved an arbitration and conceivably a distinction may be drawn between a valuation by arbitrators and by valuators. But the language quoted seems applicable in principle, especially when regard is had to the very involved contract before them in that case and to the fact that it was a case of valuation that was in question therein though those to value were designated arbitrators.

In that case apparently their Lordships assumed the party concerned might have had another remedy under the contract, and so it seemed to some of us. In this case the very "impasse" from which the parties' rights have "to be extricated" seems to render it impossible within the words preceding and forming the foundation of the covenants in the leases to find therein any remedy and hence renders it more imperative than there that the Court must act in order that justice be done.

The case cited in the above paragraph and much therein suggests there was nothing more therein than the Court doing what is done every day in our law unless the arbitration is made a condition precedent to the right of recovery. As I read their Lordships' language which I quote, in light of the contract they were dealing with, it means much more. It is, to repeat, the

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very "impasse" from which the parties' rights have "to be extricated" that is the pith of the judgment.

The agreement filed reduces the question involved, in order that justice may be done, to one of ascertaining in a proper manner the respective values of the buildings in question in each lease.

That being obtained the judgment finally should be for the respondent for the aggregate value thereof with all the costs of the reference if directed as I suggest and of entering judgment on the result.

After writing foregoing I modified my opinion as to the disposition of costs. I agreed to the judgment delivered.

Duff, J.

DUFF, J.:—This appeal should be allowed. It is necessary in my view to consider only one point.

The action is brought upon two distinct covenants in two separate leases. Each provides for the payment of the value of the buildings on the land demised to be ascertained in a certain way. In neither case has that value been ascertained. In fact there is one building, *i.e.*, a building which is a physical unit situated partly on the land demised by one lease and partly on that demised by the other, and it is the value of this building as a whole that has been ascertained. That sum cannot be recovered under either or both of the covenants for the simple reason that both the obligations and the accessory rights of action are distinct and independent. The obligation in each case is to pay a sum "proper to be paid" in respect of the buildings on the land demised by the lease in which the covenant appears which sum is to be ascertained by a valuation to be made in the prescribed manner. There is no such valuation in respect of buildings upon either parcel demised, and the condition the essential term that there shall be such a valuation is not purged by the production of a valuation of such buildings plus something else.

The judgment at the trial was not really based upon these covenants at all. In substance the learned trial Judge proceeded on the view that the appellant was "estopped" from taking this objection that the covenants were separate. I think probably by

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this the learned trial Judge means that the appellants are estopped by Millar's conduct from denying the existence of an agreement to pay the amount of the valuation.

I think the learned Judge himself holds that Millar never intended to enter into such an agreement; and I think it does not appear that Millar understood that the other parties thought he was entering into such an agreement or that they in fact thought so. If they had thought so and intended to rely upon it, it is difficult to suppose that they would not have put the agreement in writing. My strong impression is, and indeed I think it is the proper conclusion, that Mr. Kerr thought the course taken was strictly regular and the Appellate Division has upheld his view. I think he was wrong and that this action as framed fails.

I say nothing of the charge of misconduct except this: Assuming Mr. Garland's honesty to be unimpeachable he has himself to thank for the suspicions which his conduct aroused.

It does not follow that the respondent should be dismissed empty handed. I agree with my brother Idington in thinking that the principle of *Cameron* v. *Cuddy*, 13 D.L.R. 757, applies, and I concur in his proposal as to the disposition of the appeal.

DAVIES and ANGLIN, JJ., dissented.

Davies, J. Anglin, J. (dissenting)

*Appeal allowed with costs.*

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## WILLIAMS v. BLACK.

MAN.

K. B.

*Manitoba King's Bench, Curran, J. July 15, 1915.*

1. SPECIFIC PERFORMANCE (§ I E 2—35)—EXCHANGE OF LANDS—DEFECTIVE TITLE—DELAY IN PERFECTING—RIGHT TO REMEDY.

A party seeking specific performance of an agreement for the exchange of lands is not entitled to the remedy if he delays the perfecting of his title for an unreasonable time.

2. VENDOR AND PURCHASER (§ II E—29)—DELAY IN MAKING TITLE—RIGHT TO REPUDIATE CONTRACT—ESSENCE OF TIME.

In the absence of a stipulation making time of the essence of the contract, a delay of four months in perfecting title to land is unreasonable and will entitle the other party to repudiate the contract.

[*Harris* v. *Robinson*, 21 Can. S.C.R. 398; *Maber* v. *Penskalski*, 15 Man. L.R. 236; *McDonald* v. *Elder*, 1 Gr. 525, referred to.]

3. EVIDENCE (§ VI A—515)—PAROL EVIDENCE—INDEFINITE DESCRIPTION OF LAND—STATUTE OF FRAUDS.

Parol evidence is admissible to establish the legal description of land otherwise indefinite under the requirements of the Statute of Frauds.

[*Caisley* v. *Stewart*, 21 Man. L.R. 341, followed.]

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4. SET-OFF AND COUNTERCLAIM (§ I C—15)—EXCHANGE OF LANDS—ENFORCEMENT—COUNTERCLAIM FOR DAMAGES—RIGHT TO.

An agreement for the exchange of lands is not unilateral, but mutually dependent on reciprocal acts, which will disentitle a party to counterclaim for damages if he is unable to carry out his part of the contract by reason of a defect in the title.

ACTION for specific performance of an agreement for the exchange of lands.

*M. Hyman*, for plaintiff.

*L. D. Smith*, for defendant.

CURRAN, J.

CURRAN, J.:—The plaintiff seeks specific performance of an agreement in writing entered into between himself and the defendant for the exchange of properties, in the words and figures following:—

Memorandum of agreement made this 4th day of March, 1914, between Joseph Williams of the City of Winnipeg, Province of Manitoba, Contractor, party of the first part; and Alexander Black, of Arnaud, Province of Manitoba, farmer, party of the second part.

The party of the first part hereby agrees to sell and exchange and the party of the second part to purchase and exchange the following described property: House 192 Eugenie Street, Norwood, at and for the price of seventy-five hundred dollars, subject to encumbrances of thirty-one hundred dollars. Party of the second part hereby agrees to give in exchange the south-east quarter of section 25-2-3 east, clear title for the equity of the party of the first part in above described house. All adjustments to be made to date of this agreement. (Signed) JOSEPH WILLIAMS. (Signed) A. H. BLACK.

As to both signatures. (Signed) DUNCAN GILCHRIST; or, in the alternative, damages.

The defendant sets up the Statute of Frauds, repudiation of the alleged agreement, laches disentitling the plaintiff to relief, and counterclaim for damages for loss of crop and for injury to the lands from noxious weeds.

The plaintiff registered the agreement against the defendant's land, and the defendant now asks to have such registration vacated.

The statement of claim contains no allegation that the plaintiff was at any time the owner of the lands he had agreed to give defendant in exchange for the defendant's farm. It merely alleges that the plaintiff at all material times has been and now is willing and able to perform his part of the agreement. Perhaps this is a sufficient statement of the plaintiff's position, but

it seems to me that it is not. However, no objection was taken by the defendant upon this point, and I pass it by to consider the main facts as proven and the law as applicable thereto.

At the conclusion of the plaintiff's case the defendant's counsel asked for dismissal of the action, contending that the plaintiff had not shewn that he had a good title to the Norwood property, and also that the agreement, ex. 1, did not comply with the Statute of Frauds, inasmuch as the description of the Norwood property was vague and indefinite and not such a description as was required by law. I noted the objection as to title, but declined at that stage of the proceedings to give effect to it, as there certainly was some evidence of the plaintiff's title. I allowed the plaintiff to give parol evidence of the legal description of the Norwood property, which was simply described in the agreement as House 192 Eugenie street, Norwood, to meet the objection of the Statute of Frauds.

*Caisley* v. *Stewart*, 21 Man. L.R. 341, seems a clear authority for this; see page 343, where Robson, J., said:—

> It is clear that parol evidence is admissible to follow up the reference to the lots so as to ascertain their exact identity, the objection in that case being to a description of part of the property included in the agreement as "Six lots in Winnipeg as listed with J. P. Bucknam and Son."

The legal description of the plaintiff's property was then shewn to be lot 8, block 13, according to plan 386 of the Winnipeg Land Titles office, except the easterly 8 feet of the lot.

At the date of the agreement, ex. 1, namely, March 4, 1914, title to this lot stood in the name of Andrew Lang under certificate of title No. 231106, subject to a first mortgage to the National Trust Co. Ltd., for $2,400, and a second mortgage to one Loptur Jorundson for $1,200. Certain certificates of judgment against the plaintiff were also registered and in force at the date of the agreement, namely, one for $154.70, registered December 23, 1913; another for $11.90, registered January 13, 1914, and still another for $63.90, registered January 5, 1914. These judgments, while undischarged in the Land Titles office, would have prevented the registration of a transfer from the plaintiff to the defendant except subject to them, and constituted encumbrances which the plaintiff was bound to remove before asking the defendant to accept his title.

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A transfer from Andrew Lang to the plaintiff of the Norwood property was produced from the Winnipeg Land Titles office, dated May 22, 1914. The affidavit of execution was not sworn to until July 14, 1914, and the transfer itself was not registered until February 1, 1915, when a certificate of title to the plaintiff was issued, subject to the aforesaid mortgages, the aforementioned judgments having by that time been discharged.

There are now two other registered certificates of judgment against the plaintiff in force in the Winnipeg Land Titles office, namely, one for $42.60, registered August 6, 1914, and another for $1,323.66, registered February 26, 1915, and both undischarged and in force.

The plaintiff therefore had not a registered title to the Norwood property at the date of the agreement and did not become the registered owner of that property until February 1, 1915. He claims, however, to have had an agreement with Lang, made in December of 1913, or January of 1914, under which he had a potential title to this land. This agreement was not produced at the trial, but on cross-examination the plaintiff said the Norwood property was one of nine houses he was to get from Lang under this agreement in exchange for 1,160 acres of farm land. At the date of the agreement in question whatever title the plaintiff had to the Norwood property was derived under this agreement with Lang.

The solicitor Agnew, called as a witness, says he acted for the plaintiff in obtaining the transfer of this property from Lang, and that there was previous to this nothing to prevent the plaintiff from getting title from Lang except certain matters of adjustment. It does not appear, however, what these matters of adjustment were, or whether or not the plaintiff was in a position to so adjust matters with Lang as to entitle him as a matter of law and right to a transfer of the property in Norwood.

The delay on the plaintiff's part in closing out the agreement is not very clearly explained, but one cause at any rate was the existence of the first-named judgments which the plaintiff was at the date of the agreement and for some time thereafter unable to pay off and have discharged. There were also difficulties

on the plaintiff's part in making the adjustments as to taxes and interest on the mortgages on the Norwood property required by the agreement. He does not appear to have had the money to do this either, and consequently was not in a position to complete his agreement with the defendant.

The solicitors who acted for each party prior to the action being instituted were examined at the trial, but neither of them threw very much light on the dilatory conduct of the plaintiff.

The plaintiff's counsel argued that he was able on and after May 22, 1914, to give title. If he was, the defendant was not apprised of the fact until July 14, 1914, when Agnew's firm sent the Lang transfer to Frizell, the defendant's solicitor, by letter, ex. 5. This transfer was received by Frizell, but was apparently not used, and in some way unexplained, it found its way back into the hands of the plaintiff's solicitors, Agnew's firm, and was by them registered, as before stated.

There was undoubtedly a delay of nearly three months on the part of the plaintiff in obtaining title in himself to the Norwood property, apart altogether from the delay in making the adjustments. The defendant did not acquiesce in this delay, but on the contrary appears to have been anxious to close out the agreement. He says in his evidence, which is uncontradicted:—

> I employed Frizell as my solicitor to see the matter through. The papers were not made out that day (that is date of agreement, March 4). I was told to go home and the papers would be sent to me for signature. They were not sent to me and about a month later I came to Winnipeg to see what was the matter. Frizell told me not to be uneasy as I was losing nothing by waiting as plaintiff would have to pay up all adjustments to date of transferring the title. I went home again and made two more trips to Winnipeg between April and June 15, about this matter.

He goes on to say:—

> I became most persistent to find out why the deal was not going through, and was told by both Frizell and Gilchrist that there was some judgments against the plaintiff which held up the transfer.

On June 15, the defendant met the plaintiff in Frizell's office, when he says he told the plaintiff that he would not now take over the property on the basis of the March adjustments, but offered to do so if adjustments were made to the date of transfer. Nothing was done then by either party and later the defendant met the plaintiff again in Gunn & Gilchrist's office, when he was

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asked to accept a cheque for $128, in settlement of the plaintiff's liability on the adjustments. He refused, claiming that the cheque was insufficient for that purpose, which indeed was the fact as the amount only covered adjustments made up to March 4.

The defendant then wrote the letter, ex. 7, to the plaintiff, and handed it to Frizell for delivery to the plaintiff. Its contents were in due course communicated by Frizell to the plaintiff. The money, or the cheque, offered the defendant was advanced by Gunn for the plaintiff and was left in Frizell's hands until July 27 following, when he returned it to Gunn by cheque, ex. 11, after it had become apparent to him that the transaction was not going to be carried out.

The things specified in the letter, ex. 7, which the defendant required the plaintiff to do by July 16, following were not done, and the defendant contends that he had the right to repudiate the agreement in the event of default from and after such date.

The plaintiff did nothing further in the matter of completing the agreement on his part until September 15, 1914, when his solicitors wrote the letter, ex. 2, to the defendant. To this letter the defendant paid no attention, when ex. 3 was written, upon receipt of which the defendant appears to have consulted Mr. L. D. Smith as to his legal position. Mr. Smith took the matter up promptly with Mr. Agnew and wrote his firm the letter, ex. 4.

On August 3, 1914, the plaintiff, through his solicitors, registered the agreement, ex. 1. It will be observed that this was done after the defendant had notified the plaintiff by ex. 7 of his intended repudiation if adjustments were not made by July 16. It is further to be observed that the defendant resold the land on September 22, 1914, and conveyed it to the purchaser John W. Black, who has registered the conveyance to him. Specific performance on the part of the defendant is now impossible, and the plaintiff's only remedy is in damages.

Now, as to the defendant's title to his land. The evidence is that he was the patentee of the farm from the Crown. Frizell, his solicitor, had the Crown grant in his hands during the negotiations, but it was not registered. An abstract of the title to

this land put in as ex. 10, shews the registration on December 30, 1913, of a prior agreement of sale from the defendant to one John Calvin Knox. This agreement is dated December 5, 1911. The defendant admitted making this sale, and that he had received payment of part of the purchase price. He also admitted that this agreement had never been cancelled or rescinded, and although the purchaser had abandoned the farm and left this province, no legal or other steps had been taken by him to rescind the sale or obtain a quit claim deed of the land from Knox.

The solicitors for the plaintiff seemingly never took the trouble to search the defendant's title to this land, and seemingly this defect of title was not discovered or known to the plaintiff or his solicitors. At any rate it does not appear to have formed the ground of any objection on their part to the carrying out of the exchange by the plaintiff. Nevertheless, this defect of title existed, and it seems to me, put the defendant in the position that he could not at the date of the exchange agreement, nor since, have delivered to the plaintiff title to his own land. In fact he had no legal title to sell and could not have compelled the plaintiff to specifically perform the agreement in the face of the defect in his own title.

These are all the facts that need be considered. Each party is claiming damages from the other for breach of the exchange agreement.

First as to the plaintiff's right to specific performance by the defendant, and damages in lieu thereof. Ex. 1 is, I think, an open agreement and subject to the incidents implied by law *inter alia* (1) that the vendor must shew a good title, and (2) that each party must do all things necessary on his part for completion "*within a reasonable*" time. The agreement contains no time limit for performance by either party but it was competent after unreasonable delay or neglect in performance by either party for the other to make time of the essence of the agreement by notice to the other to perform within what would be a reasonable time, having regard to all the facts and circumstances of the case.

I think the plaintiff has been guilty of unreasonable and

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unnecessary delay in completion, first in the matter of perfecting his own title by securing and registering a transfer to himself from Lang. The title being under the Real Property Act, the possession of a transfer by him from Lang conferred upon him no actual legal title or interest in the land, but only a right of registration under the Act. He did not obtain the transfer until May 22, 1914, nearly three months after the date of the agreement, and did not cause himself to be registered under the Act as owner until February 1, 1915. Secondly, in the matter of preparedness to make the necessary adjustments of interest and taxes on the Norwood property, which the agreement required him to make as of March 4, 1914, and which involved the payment by him to the defendant of the proportion of interest and taxes accrued to that date. The plaintiff clearly was not prepared to make this payment until some time towards the middle of June, and then only of the amount figured up to March 4.

In this view of the matter could it fairly be said that a delay on the plaintiff's part of over four months in perfecting his own title was reasonable? I do not think so.

This was the position on July 13 when the defendant gave the plaintiff the notice, ex. 7. I think the defendant was quite justified under the circumstances in giving this notice and thereby making time of the essence of the agreement for fulfilment by the plaintiff and I further think the time limited, three days, was not unreasonably short for the purpose specified under the circumstances, as the plaintiff had had ample opportunity prior to this time of fulfilling his obligations in the matter of the adjustments. I am of opinion, therefore, that the defendant was entitled to give the notice he did give and to treat the agreement as no longer subsisting from and after the date fixed if the plaintiff failed to complete within the time limited. I think that from and after July 16, 1914, the defendant was entitled, under the circumstances, to treat the agreement as at an end, and as imposing no further liability upon him either for specific performance or to pay damages arising from a breach on his part.

Upon the whole, I think the plaintiff has been so negligent and guilty of so much delay that I would not, in the exercise of

that discretion which the Court in actions of this nature has, decree specific performance against the defendant, even if no notice to complete the exchange had been given. Nor do I think the plaintiff has made out a case where damages ought to be given in lieu of or in addition to specific performance.

I refer generally to the following authorities: *McDonald* v. *Elder*, 1 Gr. 513 at 525, where it is laid down that

> Even when time is not of the essence of the contract, parties have not an indefinite period within which to perform the terms of the agreement, but are permitted to put an end to contracts which have not been duly performed . . . by reasonable notice;

*Harris* v. *Robinson*, 21 Can. S.C.R. 390, at 398, on the right to terminate by notice:—

> I say then that in the first place the letter of November 19, 1888, having regard to all the circumstances disclosed in the evidence, was sufficient to put an end to the bargain.

See also *Maber* v. *Penskalski*, 15 Man. L.R. 236.

I think the plaintiff's action must be dismissed with costs.

Now, as to the defendant's counterclaim. I do not see how he can recover for the reason that he himself has not shewn that he was ever in a position to carry out his part of the exchange of properties. The agreement is not unilateral, but mutually dependent on reciprocal acts. He never was and is not now in a position to make title to his farm; his registered title is clouded by the Knox agreement which is still legally existing on his own admission. He must either have secured cancellation in the Courts and consequent vacation of the Registry, or procured a quit claim deed from Knox. He has done neither of these, and is in no position in the Courts either to compel the plaintiff to specifically perform or to recover from him damages for breach of the agreement. Had his own title been clear it would have been different.

I do not think he could successfully maintain an action at common law against the plaintiff for damages, because of his own defective title and inability to carry out his part of the agreement.

The defendant's counterclaim will therefore be dismissed with costs. Registration of the agreement of sale against the defendant's farm will be vacated and set aside.

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The plaintiff must pay the costs of action and there will be a set-off of costs of the counterclaim against the costs which the plaintiff will have to pay.

*Action dismissed.*

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ALTA.

S. C.

## PEARCE v. CITY OF CALGARY.

*Alberta Supreme Court, Walsh, J. May 1, 1915.*

1. TAXES (§ III I—164*a*)—EXCESSIVE ASSESSMENT OF ACREAGE—REVIEW—ACTION FOR RECOVERY BACK—RES JUDICATA.

Under the Assessment Act, Alta., a court of revision, and on appeal from that court the district court judge, has jurisdiction to entertain a complaint in respect of any or all of the matters which make up an assessment for taxation purposes, including the ascertainment of the acreage of the land to be taxed under any assessment; where uncontroverted evidence was given by the municipality on an assessment appeal as to such acreage and the assessment was fixed on that basis, such adjudication if not appealed from becomes *res judicata*, and it is not open to the ratepayer by separate action to recover from the municipality the overpayment resulting from the area of the land being afterwards found to be less than the acreage upon which the assessment was fixed.

[*Toronto Railway* v. *Toronto*, [1904] A.C. 809, distinguished.]

2. TAXES (§ III B 2—125)—ASSESSMENT OF LAND—VALUATION OF BLOCKS—FRONTAGE.

A block of land forming one parcel and held under one title may be assessed as one parcel although it is of a varying character which makes one portion much more valuable than other portions; the assessor will be assumed to have taken the varying values of the different frontages into consideration in fixing a lump sum or average rate for the entire block of land.

3. TAXES (§ III B I—116)—ASSESSMENT—DESCRIPTION OF LAND—EFFECT ON TAX SALE PURCHASER.

It is only for the purpose of a tax sale and the conveyance to the tax purchaser that a description of the land in the assessment thereof is required to be sufficient to identify the land and permit of the registration of a transfer; if the ratepayer is personally liable for the taxes on the land and he pays them under protest, it is not open to him to recover them on the ground that the identity of the land was not made clear in the description contained in the assessment roll.

[*Toronto* v. *Russell*, [1908] A.C. 493, specially considered.]

Statement

ACTION to recover taxes paid under protest.

*W. P. Taylor*, for plaintiff.

*C. J. Ford*, for defendant.

Walsh, J.

WALSH, J.:—The plaintiff sues to recover from the city the sum of $4,533.27 paid by him to it under protest in the year 1914, for the taxes rated for that year against certain taxable real estate owned by him within the corporate limits. The foundation of his claim is the illegality of the assessment which

formed the basis for the imposition of these taxes. The grounds upon which this contention rests are thus set out in the statement of claim.

(*a*) It contains no sufficient description of any parcel of land attempted to be assessed. (*b*) The plaintiff is not the owner of 68.87 acres of land in the south-west quarter of section 13. (*c*) The land is assessed at the uniform rate of $3,500 per acre when in fact the plaintiff is not the owner of any land containing 68.87 or any area approximate to that which is of uniform value throughout, and any land of the plaintiff which the defendant had the right of assessing, if assessed by the acre, should have for the purpose of said assessment been divided into as many parcels as was necessary so that each parcel would have a uniform value per acre.

The assessment of which the plaintiff complains appears in the assessment roll in columns with appropriate headings as follows:—

| No. | | | Section | No. of acres if undivided. |
|---|---|---|---|---|
| 11936 | Wm. Pearce | owner | S.W. 13 | 68.87 |

This land without the buildings on it was assessed at $275,480 but the plaintiff appealed from the assessment to the Court of Revision and thence to the District Court Judge, who reduced the assessment to $241,045, and it was upon this assessment that the taxes were paid. On these appeals he raised all of the contentions that he now urges. The city contends that the matter has thereby become *res judicata* and this must be so with respect to such, but only such of these contentions, if any, as it was within the power of these tribunals to deal with. Sec. 40 of the City Charter contains the provisions dealing with appeals to the Court of Revision. It is a most unhappily worded section. My first reading of it gave me the impression that it conferred upon that Court the power to deal only with questions of value. A more careful reading of it satisfies me that much broader powers than that are conferred by it. It imposes upon the council as a Court of Revision the duty of revising and correcting the roll, it confers a right of appeal upon any person complaining of the assessment or non-assessment of himself or any

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other person and empowers the Court to alter, raise or lower the assessment and amend the roll accordingly. The power to alter the assessment must mean something more than the mere raising or lowering of the valuation for provision is otherwise expressly made for that. The assessment is the whole of the entry against a particular person or a particular property. It includes the name of the party assessed, the quality in which he is assessed, whether as owner or tenant, the property in respect of which he is assessed, the valuation placed upon it, and whether he is to be rated as a public or separate school supporter. Assuming that his property is taxable it seems to me that any complaint which he has to make under any of these separate heads may properly be dealt with by the Court of Revision and by the District Court Judge in appeal from it. In *Toronto Railway* v. *Toronto Corporation*, [1904] A.C. 809, Lord Davey at 815, says that—

> the jurisdiction of the Court of Revision and of the Courts exercising the statutory jurisdiction of appeal from the Court of Revision is confined to the question whether the assessment was too high or too low.

That case arose, however, under the Ontario Assessment Act which expressly limits the jurisdiction of the Court of Revision to the trial of—

> all complaints in regard to persons wrongly placed upon or omitted from the roll or assessed at too high or too low a sum,

so that it is not an authority upon the construction of the very different section of the Calgary Charter which I am discussing. I think that it was quite competent for the plaintiff to appeal to the Court of Revision and afterwards to the District Court Judge in respect of the description of his property, its acreage and its assessment in one parcel instead of in more than one. He would in that event certainly have been within the language of the section, a person complaining of his assessment in these respects. I think that on this appeal the assessment could have been altered if the Court had seen fit to alter it in all or any of the respects complained of and that the final decision of the appeal would have been conclusive of the matter. Sub-sec. 2 of sec. 40 of the charter provides that the assessment roll when certified by the clerk as finally passed shall—

be valid and binding on all parties concerned notwithstanding any error or defect committed in or with regard to such roll.

This roll has been so certified and is therefore entitled to such protection as this sub-section gives it.

On his appeal to the District Court Judge, the plaintiff expressly took two of the three grounds of objection that he now urges, namely, the excessive area attributed to this land and its assessment in one parcel instead of more. I am of the opinion as I have already said that both of these matters were within the competence of the District Court Judge to deal with and having been raised before and decided by him, the plea of *res judicata* as to them must be sustained. The question of acreage was, I think, peculiarly a proper subject of appeal. It was an essential element in the fixing of the assessment which was admittedly made on the basis of the value per acre. The present plaintiff on the hearing of his assessment appeal offered no evidence as to the acreage of the land, but the city did, without objection on his part, and the learned Judge, who heard it, must have found as a fact that the land contains the area attributed to it by the assessor, namely, 68.87 acres, for he valued it at $3,500 per acre, and on that basis the assessment is fixed at $241,045, which amount can only be worked out on that valuation on the footing of the land being of that extent. Evidence was given before me on this question by the plaintiff, but none on behalf of the city. If I had to decide this point on the evidence before me, I would have to find that the land contains less than 63 acres for that is the undisputed, and to my mind, quite trustworthy evidence respecting it which is before me. I do not think, however, that the question is open to me now in view of the adjudication upon it by the District Court Judge. I understand Mr. Taylor to rely upon it now only as an element in his broader contention of illegality based upon what he claims to be the indefinite and insufficient description of the land in the assessment roll.

I could not in any event give effect to Mr. Taylor's contention that the assessment of this land in one block was an invalidity, which makes the entire assessment of this property illegal. The authority which he cited to me in support of this

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proposition was *Re The Assessment Act*, 10 B.C.R. 519. The Court in that case was sitting, as I understand it, as a final Court of appeal from the Court of Revision just as our Appellate Division might have done if the plaintiff in this case had carried to it an appeal from the decision of the District Court Judge. It therefore was not dealing, as I have to do with the question of the illegality of such a mode of assessment. It is quite true that Mr. Justice Drake rested his judgment on the ground that an assessment of 5,028.61 acres consisting in part of mountain ranges, in part of narrow valleys and in part of land valuable for agricultural purposes at a flat rate per acre was not a compliance with the statute under which the assessment was made. Mr. Justice Duff, however, took exactly the opposite view, while Mr. Justice Irving held that there was no proper assessment in respect of which an appeal would lie as it was improperly levied at the outset, the assessor not having placed a valuation on the property at all, but having arbitrarily fixed the same at $1 per acre and then called upon the company to appeal against it. The duty of the assessor under the Calgary charter is to assess lands "at their fair, actual value" (sec. 25 G) and "to make the assessment throughout the city as uniform as possible" (sec. 26). It seems to me to be absurd to say that because a block of land forming one parcel and held under one title possesses varying physical characteristics which make it otherwise than of uniform value throughout, it must be assessed in as many parcels as there are such differing characteristics and that an assessment of it in one block is so utterly bad that the owner of it need not pay any taxes on it at all. It is to be assumed, I think, that the assessor will pay regard to such things in the assessment of the land in one parcel so that in the result, his figures will be the same for it as though he had divided it for assessment purposes and added together the assessed values of the different parcels. It is quite evident from the reasons for judgment given by the District Court Judge that he took these very matters into account in reducing the assessment as he did, for, after setting them out, he says—

> taking into consideration the varying character of the land in question, I think there should be a reduction made in this assessment.

The objection to the description of the land was not specifically taken on the plaintiff's appeal from his assessment. It was covered by the general objection that the assessment was illegal and void as I take it from Mr. Taylor's argument on the hearing of the appeal. He certainly contended there for the illegality of this assessment upon that ground. That however could not make it *res judicata* for the District Court Judge had no power to determine the validity or invalidity of the assessment.

I find myself unable to reach the conclusion that the vagueness of the description could have the effect of making the assessment entirely illegal. Mr. Taylor has referred me to a number of Ontario cases in support of his contention against the legality of the assessment on this ground. They are, however, all cases in which the validity of a title founded on a tax sale was questioned because of the insufficiency of the description of the land in the assessment roll. It seems to me that there is all the difference in the world between such cases and the case at bar. One can quite well understand why it should be that if the assessment roll alone is to be looked to for a description of the land which is being compulsorily taken from the owner to satisfy the taxes charged against it, that description must be sufficient to absolutely identify the land and permit of the registration of a transfer of it to the purchaser by that description. It is however only for such a purpose that so great a degree of particularity can be required. Under the Calgary Charter a ratepayer is personally liable for the taxes rated against his property, and the same may be levied by distress and sale of his goods. Can it be possible that if, instead of paying his taxes, the plaintiff had waited to be sued for them, he could have escaped liability entirely by establishing the fact that owing to the vagueness of the description of his land, it could never be legally sold to satisfy these taxes. Would not the plain answer to that be—

It is not your land we are looking to for payment just now, it is you personally. You are assessed as the owner of certain land which is described with sufficient particularity to let you know what it is. You have exercised the right which the charter gave you to appeal against that assessment which has now become binding upon you and you must pay.

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Another ground of distinction between these Ontario cases and this is to be found in the difference that there is in the statutory provisions governing the question in the two jurisdictions. In Ontario the assessor is required to set down in his roll amongst other things the description and extent or amount of property assessable against each owner: R.S.O. 1897, ch. 224, sec. 13. In Calgary the assessor is furnished with a printed or ruled form of an assessment roll in practical conformity with the schedules to the charter "in which after inquiring, he shall set down all the information therein required to be contained" (sec. 24). It is only from the headings to the columns in the roll that one can find out what the information is that is required to be contained in the roll. There are only two columns in it which affect the question which I am considering. They are headed respectively "Section" and "No." of acres if undivided. A somewhat smaller degree of particularity in this respect would therefore appear to be exacted from a Calgary assessor than from such an officer in Ontario. Then sec. 63 of the charter which deals with the advertisement of a sale for taxes provides—

> that each lot or parcel of land shall be designated therein by a reasonable description for registration purposes.

This would seem to indicate that other sources of information than the assessment roll may be looked to for the purposes of the advertisement. In such a case as this for instance no one but a surveyor could give a description of the land that would be adequate for registration purposes unless perhaps a solicitor might compile one from an examination of the records in the Land Titles office. There is nothing in the Charter imposing such a responsibility as that upon the assessor. All that he is in strictness required to do is to give the number of the section and the area, and I should think that when the treasurer prepared his advertisement he might have recourse to the Land Titles office for a better description of the portion of the section owned by the party assessed in the year in which the assessment was made. I have been unable to find any provision of the Ontario Act which enables the treasurer to look at anything for the purposes of description, but the records which originate with

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the assessment roll. In the magnitude of the Ontario Act and its multitudinous annual amendments, I may have overlooked some such provision, but if I have not, this would form another reason for distinguishing the Ontario cases from the case at bar.

I think that the description as it stands is amply sufficient for assessment purposes. There is only one sec. 13 within the city limits. The description in effect as it appears on the rolls is—

all that part of the undivided portion of sec. 13 owned by Wm. Pearce containing 68.87 acres.

In the 3rd ed. of Cooley on Taxation, at p. 742, it is said:—

The purposes in describing the land are: first, that the owner may have information of the claim made upon him or his property, second, that the public in case the tax is not paid may be notified what land is to be offered for sale for the non payment, and third, that the purchaser may be enabled to obtain a sufficient conveyance. If the description is sufficient for the first purpose, it will ordinarily be sufficient for the others also.

If that is a fair test this description amply meets it. In *Toronto Corporation* v. *Russell*, [1908] A.C. 493, which was an action to set aside a tax sale, the sufficiency of the following description in the assessment roll was under consideration, namely—

8.57-100 acres 1242 300 east side Carlaw Avenue, north of Queen Street.

All of the Judges of the Ontario Court of Appeal, except Meredith, J., thought this insufficient: 15 O.L.R. 484. The point was not actually decided in the Privy Council as it was held that even if this was an inaccurate or insufficient description it was cured by subsequent remedial legislation. The little that Lord Atkinson did say upon the point, however, in delivering the judgment of the Board is plainly suggestive of an opinion in favour of the adequacy of the description. He says, at p. 499:—

He however seeks to have this sale set aside on the grounds: (1) that his land was insufficiently described in the assessment . . . yet he himself must know how his land was described and he never objected to the description. . . . There is much to shew that the description was adequate. Its alleged insufficiency was not shewn to have misled anybody, least of all the plaintiff.

The language of Mr. Justice Meredith, now Chief Justice Meredith, in his dissenting judgment in the Court below at p. 511 might very aptly be applied to this case. He says:—

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The description given answered fully all the purposes for which it was required to be given. There is no suggestion, there can be none, of any loss or prejudice to any one in any way by reason of any deficiency in the description. And it is always to be borne in mind that the Assessment Act has to be worked out largely by persons of ordinary intelligence and no great learning or skill, not by conveyancing counsel or others learned in technicalities and that broad common sense interpretations ought to be given to its provisions. Nothing is gained by treating the description as if it were quite bare of features, which it plainly contains. Indeed it can hardly be denied that the description as given by the assessors was ample for the purpose of making any kind of contract respecting the land; that had the owner agreed to sell, describing it in the like words neither uncertainty nor the Statute of Frauds would have enabled him to escape from his contract.

In my opinion the plaintiff's case fails upon all the grounds taken, and I must dismiss it as I do with costs. In doing so, I might with propriety quote once more from the dissenting judgment in the *Russell* case at p. 509:—

> There has been nothing like a hardship imposed upon the plaintiff, and if the plaintiff succeeds a hardship on the contrary will be imposed upon the municipality and its ratepayers at large; the plaintiff would, through some more errors in form, which in no sense misled him or caused him any sort of prejudice escape taxation in respect of these lands, and the usual consequence of non-payment of taxes whilst other ratepayers were obliged to pay or suffer the consequences of non-payment of the like taxes upon their lands.

In the view that I have taken I have found it unnecessary to consider the argument of Mr. Ford that the payment of these taxes was a voluntary payment and that the plaintiff for this reason could not get them back.

*Action dismissed.*

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## SMALL v. DOMINION AUTOMOBILE CO. LTD.

*Ontario Supreme Court, Lennox, J. January 23, 1915.*

1. SALE (§ III C—70)—CONTRACT OF—WRONGFUL CANCELLATION OF ORDER —RECOVERY BACK OF DEPOSIT.

The person who contracts to purchase a chattel, in this case an automobile, and makes a deposit along with his contract cannot recover the deposit upon his wrongfully assuming to cancel the order and refusing to take delivery; the money paid is no less a deposit because it is a part payment.

[*Howe* v. *Smith*, 27 Ch.D. 89, applied; *Snell* v. *Breckles*, 20 D.L.R. 209, 49 Can. S.C.R. 360; *Kilmer* v. *B.C. Orchard Lands Co.*, 10 D.L.R. 172, [1913] A.C. 319, distinguished.]

Statement

ACTION to recover the sum of $1,000 paid by the plaintiff to the defendants in 1906 as a deposit upon a contract to buy from

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the defendants a motor car for $4,200. The plaintiff assumed to cancel the contract, and refused to take delivery of the car. There were subsequent negotiations and agreements between the parties; but the deposit remained with the defendants, and the plaintiff did not accept the car or any car from the defendants. The plaintiff also alleged an agreement by the defendants to sell for him a car which he had previously purchased, and breach of that agreement.

*C. A. Moss*, for plaintiff.

*T. J. W. O'Connor*, for defendants.

LENNOX, J.

LENNOX, J. (after setting out the facts at length):—The first question, of course, is the question of fact: is the plaintiff's story to be believed? But it is not the only question, as, even if found in the plaintiff's favour, I would find difficulty in concluding that it was binding upon the defendants, or that it should modify or amend the written contract which the plaintiff, after the refusal and explanation he deposes to, deliberately signed, sent in to the company, and invited them to act upon, without knowledge or notice of any kind. Much more would I have difficulty in giving effect to this alleged collateral arrangement, by reason of the fact that, when the plaintiff obtained a concession and sent in his second order in 1907, he knew that an attempt had been made to sell his car and had failed, and still not one word was said to intimate that the contract was other than as stated in the written order, but, on the contrary, this order expressly stated, as the language of the plaintiff, that "there are no promises, verbal understandings, or agreements, of any kind, pertaining to this order, that are not clearly stated in it."

But this consideration does not arise, for I cannot find as a fact that the agent Thompson did during the negotiations for the sale to the plaintiff, or on the day of the signing of the order, make any promise or undertake to sell the plaintiff's car for $4,500, or at any price. . . .

The onus is upon the plaintiff. The alleged agreement is contrary to the contracts and inconsistent with the letters and conduct of the plaintiff. The alleged agreement was never mentioned to the defendant company until the plaintiff was about

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to sue, and was not then followed up. The plaintiff has not established his contention upon this issue.

Then, is he entitled to recover back the money he paid? I am of opinion that he is not. Aside from the law governing deposits—treating the $1,000 simply as a part payment—I cannot see how he can recover.

The defendants have always been ready and willing to carry out the contract upon their part. . . . The plaintiff wholly repudiated the contract by letters, and followed this repudiation by action. Even after the action, the company, by letter of June 2, repeat their repeated offers of delivery; and again offer delivery in their statement of defence. The plaintiff replies that the order is cancelled. The plaintiff was expressly bound to pay the balance when the car was ready for delivery. He is the party in default—the only party in default. The Court cannot assist him in breaking his contract. If the matter were reversed, and the defendants were refusing to complete by reason of delay, the Court might relieve them, upon the principle of *Kilmer* v. *British Columbia Orchard Lands Limited*, 10 D.L.R. 172, and the majority judgment in *Snell* v. *Breckles*, 20 D.L.R. 209. But the plaintiff is not asking to be relieved from the harshness of an opponent inequitably setting up a forfeiture. He is seeking to take advantage of his own wrong. The plaintiff relied upon the Breckles case. It cannot be invoked to help the plaintiff. It has no application to this case except as an illustration upon reversed conditions.

But this is "a deposit." It is so treated in the contracts, in the receipt, in all the plaintiff's letters, and in the plaintiff's statement of claim and reply; and for this reason, too, the plaintiff, being the defaulter, cannot get the money back: *Howe* v. *Smith* (1884), 27 Ch.D. 89, where the history of earnest and deposit is reviewed by Fry, L.J.; *Hall* v. *Burnell*, [1911] 2 Ch. 551; *Collins* v. *Stimson* (1883), 11 Q.B.D. 142, where Baron Pollock said: "According to the law of vendor and purchaser the inference is that such a deposit is paid as a guarantee for the performance of the contract, and where the contract goes off by default of the purchaser, the vendor is entitled to retain the deposit:" Halsbury's Laws of

England, vol. 25, p. 133, para. 245, note (*d*), and p. 237, para. 418, note (*t*); and it is none the less a deposit because it is a part payment: *Howe* v. *Smith, supra.*

I was disposed to suggest that the plaintiff might still avoid loss by the company applying the deposit as part payment upon a car now to be delivered to and accepted by the plaintiff; but counsel for the plaintiff anticipated me in this, and pointed out that present delivery would not be entertained—that a 1915 car would not be accepted. Be it so.

There will be judgment dismissing the action with costs.

*Action dismissed.*

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## MELANSON v. THE GORTON PEW FISHERIES CO.

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*Nova Scotia Supreme Court, Sir Charles Townshend, C.J., Graham, E.J., and Longley, and Ritchie, JJ. February* 13, 1915.

1. SHIPPING (§ III—10)—ILLNESS OF SEAMAN—MEDICAL ATTENDANCE—LIABILITY OF MASTER—SERVICE EX JURIS.

Although a vessel and its owners are under obligation to bear the expenses of the illness of a seaman in the services of the ship in addition to his wages while ill, at least so long as the voyage is continued, there is no implied contract in respect of the physician's charges between the shipowner and the physician called in by the seaman to attend him while visiting in port during the employment; and leave under N.S. Order 11, sec. 1, to serve process out of the jurisdiction should be refused the physician suing the shipowner for the account where there was neither an express contract by the latter for the services rendered the seaman, nor circumstances from which a direct contract to pay could be implied.

[*The "Osceola,"* 189 U.S.R. 175; *The "Iroquois,"* 194 U.S.R. 240, followed.]

Statement

APPEAL from the judgment of Pelton, Co.C.J.

*W. H. Covert*, K.C., for appellant.

*W. E. Roscoe*, K.C., for respondent.

Sir Charles Townshend, C.J.

SIR CHARLES TOWNSHEND, C.J.:—The sole question involved in this appeal is whether there has been disclosed in the plaintiff's affidavit a breach of any contract between the plaintiff and defendant company. Order 11, sec. 1 (e), specifies the grounds on which service out of the jurisdiction or notice of a writ of summons may be allowed, that is to say:—

> Where the action is founded on any breach or alleged breach within the jurisdiction of any contract wherever made which according to the terms thereof ought to be performed within the jurisdiction.

Now, it is clear enough that if a contract existed between the plaintiff and defendant company, the breach or alleged breach of it, occurred within the jurisdiction of the Court.

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The claim is for medical services and the nursing of a sick seaman, one of the crew of defendant company's vessels. The seaman was on a fishing voyage in defendant company's vessel, and while in port was permitted by the captain to visit for a few days some friends and while there was stricken down with typhoid fever, and at his request plaintiff, a medical practitioner, was called in and performed the services sued for. The defendant company, though notified by the plaintiff while he was attending the seaman, of his claim on the company, refused to authorize or acknowledge any claim whatever. There was therefore clearly no express contract and unless one can be implied from the circumstances or from some statute it would seem plaintiff has no cause of action which he can enforce against the company.

The liability of the vessel and its owners to provide necessary medical attendance and care for a sick seaman, one of its crew, occurring during the voyage is clear beyond controversy. I refer to the case of "*The Osceola*," 189 U.S.R. 175, where the Court say:—

> Upon a full review, however, of English and American authorities upon these questions we think the law may be considered as settled upon the following propositions: (1) That the vessel and her owners are liable in case a seaman fall sick or is wounded in the service of the ship to the extent of his maintenance and cure, and to his wages at least so long as the voyage is continued.

In "*The Iroquois*," 194 U.S.R. 240, and by Story, J., in *Harden* v. *Gordon*, 2 Mason 547, the same statement of the law will be found. Also, in Maclachlan on Merchant Shipping, 270.

There is therefore no difficulty in that part of the case. The vessel and its owners are liable for the maintenance and medical attendance on this seaman, but liable to whom. As there is no contractual relation between plaintiff and defendant, either expressed or implied, I regret to say that in the absence of a statute it would be impossible for him to recover, at least no authority was cited by plaintiff's counsel indicating that a third party could recover against defendant company.

The contention that general maritime law gives the plaintiff a right of action is not sustained by any authority cited by counsel. In some form no doubt the defendant company could be made responsible for these services, possibly by the deceased's administrator, although as to that I give no definite opinion. Some

of the cases cited by counsel for defendant shewed how careful the Court must be in granting orders for service out of the jurisdiction, such as *Moritz* v. *Stephan*, 36 W.R. 779, where North, J., deals with this question.

I come to the conclusion that the County Court Judge was right and that the appeal must be dismissed with costs.

GRAHAM, E.J.:—I agree that plaintiff has no remedy, but I think there should be no costs for two reasons: (1) The defendant did not appear and there is no solicitor on the record. (2) The action fails because there is a wrong plaintiff on the record.

Graham, E.J.

RITCHIE, J.:—The sole question in this case is as to whether there was a contract between the plaintiff and the defendant company. I agree with the opinion of the Chief Justice, and would not add anything but for the fact that Mr. Covert, K.C., has since the argument drawn the attention of the Court to authorities. I do not think that these authorities have any application. The citation from Labatt on Master and Servant simply states a principle about which there is no doubt, namely, that under the Law Maritime the seaman who has contracted a sickness while in the service of his ship is entitled to be cured at the expense of the shipowner. The question of the right of a third party to bring an action against the shipowner is not touched upon. In the case of *Holt* v. *Cumming*, 102 Pa. 212, the plaintiff, who was a doctor, was called in by the captain of the ship. He had authority to bind his owners. In *Anderson* v. *The Wemsleydale*, 41 Fed. Rep. 829, I am unable to find any comfort for the plaintiff. It does not afford any assistance on the question of contract or no contract. The quotation from Lord Alvanley, C.J., in *Wennall* v. *Adney*, 3 B. & P. 247, is, I think, applicable only to public officers charged by law with the relief of the poor.

Ritchie, J.

With regret, I am forced to the conclusion that the appeal must be dismissed.

LONGLEY, J., concurred.

Longley, J.

*Appeal dismissed.*

MAN.

C. A.

## PESCOVITCH v. WESTERN CANADA FLOUR MILLS.

*Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron and Haggart, JJ.A. July 23, 1915.*

1. NEW TRIAL (§ III B—15)—VAGUE FINDINGS—PROXIMATE CAUSE—DEFECTIVE ELEVATOR.

A general affirmative finding by a jury on a question as to whether the unsafe condition of an elevator was the cause or one of the causes of an accident, without specifying the particular cause, is too vague on which to enter up judgment and ground for a new trial.

[See 18 D.L.R. 786.]

Statement

APPEAL from a judgment of Galt, J.

*E. A. Cohen*, for appellants, defendants.

*T. J. Murray*, for respondent, plaintiff.

The judgment of the Court was delivered by

Howell, C.J.M.

HOWELL, C.J.M.:—The plaintiff sustained injuries while ascending with a part of a plank which he was carrying on a Humphrey elevator in the defendant's mill. At the trial the following questions were submitted to the jury:—

1. (*a*) Was this Humphrey elevator a reasonably safe instrument for its purpose? (*b*) And if not, was this unsafe condition the cause, or one of the causes of the accident? 2. (*a*) Was it negligent for the plaintiff to use the Humphrey elevator as he did, carrying the board in question? (*b*) And was this negligence, if any, the cause or one of the causes of the accident? 3. (to be answered only, if the answer to question 1 (*a*) was "no," and the answer to question 2 (*a*) was "yes." (*a*) Could this Humphrey elevator (if unsafe), have been made reasonably safe by proper alterations or by some contrivance or device? (*b*) And if such alterations had been made or such contrivance or device had existed, could the accident have been avoided in the particular circumstances?

To question 1 (*a*) the jury answered "no." To question 1 (*b*) the jury answered "yes." The answer to question 2 (*a*) was "no." None of the remaining questions were answered.

The jury assessed the damages at $2,500, and the Judge directed judgment to be entered for the plaintiff for this amount.

The form of question 1 (*b*) and its answer make it impossible to say whether the jury found that the defect was *the* cause or only one of the causes of the accident. In matters of this

kind, without delving into fields of philosophy, there are often many acts or conditions, or both, which unitedly caused or promoted the accident and this has led to many legal discussions on the subject. In *Chartered Mercantile* v. *Netherlands*, 10 Q.B.D. 521, at 531, the *cause* which may create a legal liability is described as the "*causa causans*," the following language is used:—

> We are entitled to look at what was the real cause of the loss, that is as it is expressed in our legal phraseology, we may look at the *causa causans* instead of merely looking at the *causa proxima*.

In *Hill* v. *New River Co.*, 9 B. & S. 303, referred to as authority on the subject in Beven on Negligence, 86, an open ditch, insufficiently fenced, ran along the highway, the defendants caused a stream of water to spout on the highway which frightened the plaintiff's horses as they were being driven along the highway and they fell into the ditch. The unfenced ditch might well be the *causa proxima*, but the Court held that the spouting water was the *causa causans* and that the defendants were liable. It is also discussed in Pollock on Torts at 464, where he considers whether the "cause" should be the "proximate cause" or the "decisive cause" to create legal liability. In the United States Supreme Court it is described as the "*causa sine qua non*." *Hayes* v. *Michigan*, 111 U.S. at 241.

Where an action is tried by jury the latter are the sole judges of the fact, and where there is not a general verdict, the Judge can only enter the judgment which is the only logical conclusion to be drawn from the facts found. Here the defect was one of the causes of the accident. Were there other causes? The Judge cannot decide these. We do not know what was the real cause, the *causa causans*.

I think the Judge should not have entered judgment for the plaintiff. However, under all the circumstances of the case, justice will be done by granting a new trial. I think it well, as there is to be a new trial, to make no comment on the evidence.

With great deference I think the questions are not well framed—if I may use the expression, I think them too leading. It seems to me better to ask the jury by suitable questions what caused the accident, and if by defect in machinery or ways, to

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set forth the defect, or, if by negligence, to set forth the negligence, and of all things get them to find what was the real cause of the accident.

Again I desire to point out that in this province we have not any direct legislation corresponding with sec. 111 of the old Ontario Judicature Act or sec. 61 of the 1914 Act. Our r. 673 seems to take for granted that there is power to ask questions and for the Judge to enter judgment on those answers assuming perhaps that sec. 51 of the Act is wide enough for the purpose. However, this point has not been raised in this suit and need not be further considered.

The judgment entered for the plaintiff will be set aside, there will be a new trial. The costs of the former trial and of this appeal will be costs in the cause to the successful party.

*Appeal allowed.*

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ALTA.

S. C.

## REX v. McCLAIN.

*Alberta Supreme Court, Scott, Beck, Stuart, and Walsh, JJ. January 26, 1915.*

1. CRIMINAL LAW (§ II A—31)—PRELIMINARY INQUIRY—CAPTION TO DEPOSITIONS.

It is not an objection that depositions taken in a preliminary inquiry have no formal caption to indicate the case in which they were taken if such depositions returned into the superior Court are physically attached to a document called the "statement of accused," which sets forth the charge and date of hearing and that the charge was read to the accused and that on being given the statutory warning he made no statement, and it further appears from the depositions themselves that they refer to the charge so recited in the "statement of accused."

2. APPEAL (§ I C—25)—CRIMINAL CASE—QUESTION OF LAW—CORROBORATIVE EVIDENCE.

Where corroborative evidence is not required by statute and there is nothing to shew that the Judge trying a criminal charge without a jury had misdirected himself upon a matter of law, it is irregular to reserve for the Court of Appeal the question whether the evidence disclosed sufficient corroboration of an accomplice's evidence, such not being in such circumstances a "question of law" within Cr. Code sec. 1014.

[*R.* v. *Bechtel*, 5 D.L.R. 497, and 9 D.L.R. 552; 19 Can. Cr. Cas. 423, and 21 Can. Cr. Cas. 40, referred to.]

3. THEFT (§ I—12)—RECENT POSSESSION—EVIDENCE.

On a charge of theft the presumption arising from recent possession of the stolen goods may be applied against the accused in conjunction with direct evidence.

4. WITNESSES (§ I B—15)—COMPETENCY—ONE OF TWO JOINTLY CHARGED PLEADING GUILTY.

Where two persons were jointly charged with theft and one pleaded guilty and the other not guilty, the former may be called as a witness

against the latter although sentence had not yet been passed upon the plea of guilt; in such a matter it must be left to the discretion of the presiding Judge to decide what is the fairest and most convenient course to pursue in the particular case, and whether there should be an adjournment of the trial or an immediate sentence of the accomplice; and where he is holding the trial without a jury, it is not error for the Judge to take cognizance of the accomplice's evidence before sentencing him, although in receiving the testimony the Judge expressed a view favouring a different course had there been a jury.

[*Winsor* v. *The Queen*, L.R. 1 Q.B. 390, and *R.* v. *Payne*, L.R. 1 C.C.R. 349, discussed.]

5. CRIMINAL LAW (§ II B—47)—NAMES OF CROWN WITNESSES—FORMAL CHARGE WHERE NO GRAND JURY SYSTEM.

The context of secs. 874 to 876 of the Criminal Code makes sec. 876 (endorsing names of witnesses on bill of indictment) inapplicable to proceedings by formal charge in a province where there is no grand jury system, notwithstanding the extended meaning given to the word "indictment" by Cr. Code sec. 2 (16); effect is to be given to the latter only in the event of the context being consistent therewith.

6. CRIMINAL LAW (§ II B—47)—DISCLOSING TO ACCUSED BEFORE TRIAL NAMES OF WITNESSES AGAINST HIM.

While no definite rule is laid down in the Criminal Code to compel the endorsing of the names of witnesses for the prosecution on a formal charge laid by the agent of the Attorney-General under Cr. Code sec. 873A (applicable in Alberta and Saskatchewan), the presiding Judge may give all necessary protection to the accused so that he may have a fair opportunity to defend himself; the name of any additional Crown witness not examined at the preliminary inquiry ought, as a matter of fairness, to be disclosed to the accused—at any rate if he asks for the information.

[*R.* v. *Gleenslade*, 11 Cox C.C. 412, referred to.]

7. TRIAL (§ I D—21)—CRIMINAL CASE—CROWN WITNESSES AT PRELIMINARY INQUIRY.

If the Crown does not intend to call at the trial a witness whom it called on the preliminary inquiry, such witness should be made available to the defence unless his evidence is unquestionably immaterial. (Dictum by the Court.)

Statement

CROWN case reserved by McCarthy, J., on a charge of theft.

*F. W. Griffiths*, for accused.

*James Short*, K.C., for the Crown.

The judgment of the Court was delivered by

Stuart, J.

STUART, J.:—This is a case reserved for the opinion of the Appellate Division by Mr. Justice McCarthy. The accused was charged jointly with one Mathews with the offence of having stolen a horse and mare, the property of one Brink, on July 1, 1914. The charge was in the usual form and was signed by James Short, as agent of the Attorney-General. When the charge was read to the accused, McClain pleaded not guilty and Mathews pleaded guilty. The learned trial Judge reserved sentence upon Mathews. Afterwards, but before sentence was passed upon

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Mathews, the trial of McClain was proceeded with, and he elected to be tried without a jury. The trial Judge convicted McClain. The chief evidence against him was that of his accomplice Mathews, who had pleaded guilty, but was awaiting sentence.

At the opening of the trial, counsel for McClain applied to quash the charge or indictment on the ground that there were no proper depositions, as required by sec. 682 of the Code. This objection was reserved, but ultimately over-ruled by the trial Judge.

When Mathews was called to give evidence on behalf of the Crown, and before he was sworn, the following discussion took place:—

"*Mr. Griffiths*: I wish to invite your Lordship's attention to the fact that the next witness, Mathews, has pleaded guilty to this same charge, but has not yet been sentenced. For this reason I wish to raise objection to the receipt of the evidence of Mathews until after he has been sentenced.

[Point argued by both Mr. Griffiths and Mr. Short.]

"BY THE COURT: In view of these authorities, Mr. Short, do you still tender the evidence of the witness Mathews?

"*Mr. Short:* Yes, my Lord.

"BY THE COURT: Well, the responsibility is upon you. I will admit the evidence, subject to Mr. Griffiths' objection."

Mathews then gave evidence and other evidence was adduced by the Crown which was intended to corroborate the story of Mathews.

At the close of the prosecution counsel for the accused renewed his former objections, which were all over-ruled. In reference to the testimony of Mathews, the learned trial Judge said:—

"The cases cited by counsel for the accused, I find, do not determine the point. Cockburn, C.J., determined it was a very bad practice this holding out an inducement to the witness to give evidence in favour of the Crown in the anticipation that the Crown would be lenient with him when moving for sentence in his case. Had there been a jury in this case, I would have been inclined to sustain the objection, but, as there is no jury and as the cases cited by the counsel for the accused do not decide this, I take it upon myself to permit that evidence to go in, exercising my own judgment as to

what weight I should give to the evidence of Mathews under the circumstances."

Evidence for the defence was then given, and the accused was convicted and sentenced to 3 years in the penitentiary. Upon the application of counsel for the accused, the learned trial Judge reserved a case for the opinion of this Court upon the following questions:—

1. Should the indictment or charge have been quashed?

2. Does the evidence disclose sufficient corroboration of the evidence of Mathews?

3. Can the presumption arising out of recent possession of stolen property have any bearing on the case when the Crown attempted to make out its case by direct evidence?

4. Was I right in so remanding Mathews for sentence and permitting him to testify against McClain before imposing sentence?

5. Was I right in permitting the Crown to call witnesses who were not called at the preliminary hearing or whose names were not endorsed upon the charge?

6. Upon the above grounds or any of them should the conviction be quashed?

I think the first question should be answered in the negative. In the case reserved it is stated that "it was admitted by the Crown prosecutor that the charge was not ordered by a Judge or agent of the Attorney-General, and that objection to the same was taken before election or plea." In view of the undoubted fact that Mr. Short did, in fact, sign a charge in the usual way, a copy of which is in the case submitted and the actual original of which was shewn to us as part of the documents on file, there can be no doubt that there was some misapprehension when the case was prepared with the statement of admission above cited inserted in it. It is clear that what was intended was that there was no order of a Judge directing the charge to be laid and no special direction or order by the Attorney-General.

The contention made by counsel for the accused was that, owing to certain alleged defects in the depositions taken upon the preliminary inquiry, the case should be treated upon the footing that there were no depositions and no preliminary inquiry at all, and that, therefore, in the absence of such a proper preliminary hearing, the agent of the Attorney-General had no power

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under sec. 873A of the Criminal Code to prefer any charge against the accused.

If the premises of the learned counsel were correct, it would be necessary for us to consider one of the questions raised in the cases in *Re Criminal Code*, 16 Can. Cr. Cas. 459, and in *Rex* v. *Duff* (*No.* 2), 15 Can. Cr. Cas. 454.

In my opinion, however, it is not necessary to consider that important question, because it seems clear that there was a proper preliminary inquiry and proper depositions.

The only criticism made of the form in which the depositions appear was that there did not appear any separate caption to the page upon which the evidence commenced. There is, first, a document headed "Statement of the Accused," which sets forth the charge against the accused, the date of the hearing, the fact that the charge was read to the accused, that the statutory warning was given, and that the accused made no statement. This document is signed by the Justice of the Peace, and then follows, physically attached to the first document by a pin, six pages of foolscap, upon which what purports to be the evidence of the witness called is written down in pen and ink, and each page purports to be signed by the witness and by the same Justice of the Peace who signed the first document. A perusal of this evidence shews that the witnesses were referring to the charge referred to in the first document. There is also before us the information and complaint not attached to the other documents, but plainly referring to the same charge. It is true there is no record of the committal for trial, but, in my opinion, there is sufficient to shew that the accused did, in fact, have the advantage of a preliminary inquiry. Inasmuch, therefore, as it is only upon the ground that an agent of the Attorney-General cannot prefer a charge without there having been a preliminary inquiry that the contention is made that the charge should have been quashed, I do not think that some slight defects in the form in which the magistrate returned the depositions to the proper Court can be taken advantage of to uphold such an argument.

With regard to the second question, I am of opinion that it does not raise any point of law at all, and that no question is properly reserved for our opinion. This Court has already decided in *Rex* v. *Bechtel*, 5 D.L.R. 497, 19 Can. Cr. Cas. 423; 9 D.L.R. 552, 21 Can. Cr. Cas. 40, that a jury not only may, but ought

to, be told that, while they ought not to convict on the uncorroborated testimony of an accomplice, they are strictly in law at liberty to do so if they see fit.

Where corroborative evidence is required by the Code, it is the duty of the trial Judge to instruct the jury as to what part of the evidence, if any, bears that character, and if he mis-instructs them, there is no doubt the matter can be reviewed on a reserved case. And so also, where there is no jury, if the Judge has obviously treated as corroborative evidence something which is not such within the meaning of the Code, it would probably be fatal to the conviction.

But in the present instance corroborative evidence was not strictly necessary at all. The learned trial Judge indicated, when convicting the accused, that he considered certain things corroborative of the evidence of Mathews, the accomplice. Whether those things would or would not have come within the meaning of the term "corroborative evidence" had such evidence been required by law might have been in such a case a legitimate matter for argument; but I am unable to see how, when the trial Judge was acting entirely as a jury and could not be said to have been directing himself upon a matter of law at all, it can be open to this Court to question the propriety of his views on the matter. The second question, therefore, should not, in my opinion, be answered otherwise than by saying that it does not raise a point of law which can be reserved.

The third question should, in my opinion, be answered in the affirmative. The Crown is entitled to make out its case both by asking the Court to apply the principle of recent possession and by other more direct evidence of the theft. There is no reason, that I can discern, why both means should not be adopted at the same time. No authority was quoted for the opposite view and the matter appears to me to be too plain for argument.

The fourth question, treating it as a pure matter of law, should, I think, also be answered in the affirmative. By this I mean that it does not appear to me that any error in law was committed by the learned trial Judge in hearing the evidence of the confessed accomplice, Mathews, before sentence had been passed upon him.

The simple question involved seems to be this: Was he at the time he was called by the Crown a competent or an incom-

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petent witness? No serious attempt was made to shew that he was not a competent witness. It is clear that he was, and, being so, the Crown had a right to call him. The observations of Cockburn, C.J., in *Winsor* v. *The Queen*, L.R. 1 Q.B. 390, as explained by him in *Reg.* v. *Payne*, L.R. 1 C.C.R. 349, 354, were only directed to the question of convenience and fairness. It is obvious that in such a matter it must be left to the discretion of the presiding Judge to decide what in each particular case is the fairest and most convenient course to pursue. The learned trial Judge here did, indeed, say that had there been a jury he would have been inclined to take a different course. It was argued that this amounted to an exercise of his discretion against the propriety of admitting the evidence of Mathews, and yet he, in fact, admitted it and acted upon it.

In my opinion, what he said amounted to nothing more than saying that in other circumstances, viz., if there had been a jury, he *might* have guided the course of the trial, either by adjournment or by an immediate passing of sentence upon Mathews before he testified, in a different way from that he thought fit to adopt when sitting alone. Before passing sentence upon Mathews he felt the need of learning more about the case, and this he expected to do upon the trial of McClain. He no doubt felt, and quite properly, that he could make all due allowance for the position in which Mathews stood when he came to weigh that person's testimony. While, therefore, there may be circumstances in which the presiding Judge ought to regard the views of Cockburn, C.J., in *Winsor* v. *Reg.*, L.R. 1 Q.B. 390, as a proper guide, it is impossible to say that there is any fixed rule of law applicable to the matter which must be followed in all cases.

Question five should be answered in the affirmative. Section 876 of the Code says that "the name of every witness examined or intended to be examined shall be endorsed on the bill of indictment; and the foreman of the grand jury or any member of the grand jury so acting for him shall write his initials against the name of each witness sworn by him and examined touching such bill of indictment." This section is one of five sections, 874 to 878 inclusive, which are under the caption "proceedings before the Grand Jury." It is true that by sec. 2 (16) of the Code, being the interpretation section, the word "indictment" includes "any formal charge under 873A" but this is subject to

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the qualification at the beginning of the main section "unless the context otherwise requires."

In my opinion, it is obvious that, owing to the context, it is not possible to treat sec. 876 as applying to a charge under 873A signed by the agent of the Attorney-General. It is clear that the words, "every witness examined or intended to be examined," refer to the examination before the grand jury, not to examination at the trial before the petty jury. The agent of the Attorney-General who signs a charge under sec. 873A does not examine witnesses like a grand jury. Very frequently I have seen attempts made to press the analogy between the agent of the Attorney-General in Alberta and Saskatchewan and the Grand Jury in other provinces, but it is clearly impossible to extend the analogy so far as to make sec. 876 applicable in Alberta. By its very terms the section is incapable of application.

As a measure of fairness and justice, the Crown ought to furnish to the accused in some form the names of the witnesses intended to be called in chief in support of the Crown's case. As a general rule this information is sufficiently given by the depositions taken on the preliminary hearing. Any witness there examined should be made available to the defence if the Crown does not intend to call him unless his evidence is unquestionably immaterial. And the name of any additional witness not examined at the preliminary inquiry which the Crown proposes to call in chief ought, as a matter of fairness, at a reasonable early period, at any rate if asked for, to be made known to the accused. But there is no law laying down any definite rule in this matter, which must be left to the presiding Judge to deal with in such a way as to give all necessary protection to the accused and to give him a fair opportunity to defend himself against the charge. See *Rex* v. *Gleenslade*, 11 Cox 412, 413, note.

The result is that the conviction is affirmed.

*Conviction affirmed.*

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**BOLL v. MONTGOMERY.**

SASK.
S. C.

*Saskatchewan Supreme Court, Elwood, J. February 5, 1915.*

1. TRIAL (§ VI—320)—NOTICE OF TRIAL—COMPUTATION OF TIME—TRANSFER OF ACTION.

Where the time for setting down for trial and the giving notice of trial has begun to run prior to the action being transferred from a District Court (Sask.) to the Supreme Court, such time will count as part of the time within which the action will have to be set down for trial in the Supreme Court of Saskatchewan.

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Elwood, J.

APPLICATION to dismiss an action.

*P. H. Gordon*, for appellant.

*C. M. Johnston*, for respondent.

ELWOOD, J.:—This was an action originally commenced in the District Court, but which was in December, 1914, transferred to the Supreme Court. Sec. 42 of the District Court Act provides as follows:—

> Upon any action in the District Court being transferred to the Supreme Court the Supreme Court shall have jurisdiction in such action and the same shall thenceforth be continued and prosecuted in the Supreme Court as if it had been originally commenced therein.

On or about January 20 the defendant moved to dismiss the action for want of prosecution in not setting the same down for trial, and also for liberty to sign judgment on the counterclaim in default of pleading thereto. At the time of this application six weeks had not elapsed from the date of the order transferring the action to the Supreme Court, and for that reason apparently the acting Master in Chambers held that the application to dismiss was premature. It was apparently admitted before me on the argument that the application to dismiss was made more than six weeks after the time when the plaintiff first became entitled to give notice of trial, if time is to be counted prior to the transfer to the Supreme Court. I am of the opinion that the effect of sec. 42 of the District Court Act is to simply continue the action in the Supreme Court instead of the District Court and that where the time for setting down for trial and the giving notice of trial has begun to run prior to the action being transferred to the Supreme Court, that time would count as part of the time within which the action would have to be set down for trial in the Supreme Court. I have therefore come to the conclusion that the acting Master was incorrect in his order.

The order of the acting Master will therefore be varied by providing that the plaintiff shall give notice of trial and set this action down for trial within two weeks from the date hereof, otherwise the action will be dismissed with costs. The plaintiff will pay to the defendant the costs of the application to the

acting Master and of this appeal. The order in so far as it gave the plaintiff leave to plead to the counterclaim will not be disturbed.

*Order varied.*

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**ROBINSON LITTLE & CO. v. TOWNSHIP OF DEREHAM.**

ONT.
S. C.

*Ontario Supreme Court, Falconbridge, C.J.K.B. March 16, 1915.*

1. HIGHWAYS (§ IV A 5—151)—LACK OF GUARD RAILS—INJURIES TO TRAVELLERS — LIABILITY OF MUNICIPALITY — CONTRIBUTORY NEGLIGENCE.

Contributory negligence of the driver of a democrat waggon in which the plaintiff's goods, consisting of commercial traveller's samples were being conveyed for hire along with the commercial traveller as a passenger, is not attributable to the plaintiffs in answer to their claim against the municipality for damages to the goods on the waggon being upset and the trunks broken, due to the neglect of the municipality to protect a narrow part of the roadway by a guard rail, if the plaintiffs' traveller in no way participated in or was responsible for the driver's alleged acts of negligence.

[*Mills* v. *Armstrong*, "*The Bernina*," 13 A.C. 1; *Bloch* v. *Mayer*, 7 O.W.N. 830, referred to.]

Statement

ACTION to recover damages for injury to goods.

*Sir George Gibbons*, K.C., and *G. S. Gibbons*, for plaintiffs.

*G. H. Watson*, K.C., and *S. G. McKay*, K.C., for defendants.

Falconbridge, C.J.K.B.

FALCONBRIDGE, C.J.K.B.:—The plaintiffs are wholesale dry goods merchants carrying on business at the city of London. On January 29, 1914 (a very dark night), a traveller of the plaintiffs, in the usual course of his business, was being driven with his cases of samples in a waggon known as a democrat (and described as a good, fairly heavy waggon), drawn by two horses, along a highway of the defendants, viz., the 10th concession line.

The conveyance in which the cases containing the samples were being carried was upset, and the samples were so damaged as to be rendered of no value. The plaintiffs contend that the highway had become defective owing to the neglect of the defendants. The defendants, besides denying this allegation, contend that, if damages were sustained as alleged, the same were caused through the neglect and fault of the plaintiffs, and not of the defendants.

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I find that the road at the place of the accident was too narrow. It was not only too narrow, but it narrowed in at one place and widened out at another, which made it more dangerous than it otherwise would have been. Secondly, I find that it should have been protected by a guard-rail. The road was not in a state reasonably safe and fit for ordinary travel.

Dereham is a very wealthy township, with an assessment of $3,000,000 and a tax rate of 7 mills.

The defendants rely on two different grounds of alleged negligence causing the accident; first, as to the plaintiffs' agent travelling on a dark night without a lantern; and, secondly, on an alleged defective and negligent packing of the load of samples in the waggon, causing the load to be top-heavy.

The plaintiffs say that, if any such negligence existed, it was the negligence of the driver of the waggon, who was the servant of the livery stable keeper, and that there was no identification or relationship between the plaintiffs and the driver.

Atkins, the plaintiffs' traveller, on the night in question, was in the village of Brownsville, in the said township, and finished his business there about 5.30. Then he packed up his samples and telephoned to Barnett, a liveryman at Tillsonburg, to take him and his samples (contained in six trunks) to that town. A conveyance came over, driven by one Bouncer, an employee of Barnett. Bouncer had driven Atkins before. Atkins had not intended to drive the "rig" himself, and did not in fact do so.

The distance between the two places was about 7 miles. It is Atkins's practice, when he finishes his business in a place at any time before 10 p.m., to drive to the nearest place for the next morning's business. On this night his samples were loaded on the "rig," and they left Brownsville between 7.30 and 8 o'clock.

About a quarter of a mile west of the scene of the accident, Atkins found the waggon being "canted," and got off, lit a match, and found where they were, and Bouncer drove on the road again. Bouncer also was out of the "rig" once to find out where they were.

The trunks were about 2½ ft. high by 32 to 36 in. long and 24 in. wide, all well filled, and weighing about 225 lbs. each.

Atkins did not put in the trunks nor help to put them in

nor see them being put in. The trunks were piled by Bouncer—who was called as a witness by the defendants—three in the waggon box and three on top, roped from handle to handle on each side and fastened to the waggon. Bouncer says he did not know that the load was top-heavy; he did not think it was top-heavy, and he would not call it top-heavy. He says also that he packed them carefully and fastened them carefully—"the way I always fasten them"—and thought it was safe. He (Bouncer) did the driving, "did not ask Atkins how and did not think it was for Atkins to interfere with" him. Bouncer had been driving "mostly all his life" since he was big enough to handle a team.

They had gone only about one mile or a mile and a quarter from Brownsville when the accident happened. A short time before, one of them (probably Bouncer) suggested that it would be better to have a lantern. They saw lights ahead of them, and they seem to have agreed, on Bouncer's suggestion, that when they got to that house they would get a lantern, but, before they got so far, the waggon upset.

If there was any negligence in either respect causing or contributing to the accident, in the sense that without such negligence the accident would not have happened (and I do not find that there was), it was the negligence of the driver, in which the plaintiffs' traveller in no way participated or was responsible for.

An analysis of the cases brings me to the clear conclusion that the plaintiffs are not identified with the negligence of Bouncer and his employer, if any such existed. See *Mills* v. *Armstrong*, *"The Bernina,"* (1888), 13 App. Cas. 1; *Flood* v. *Village of London West* (1896), 23 A.R. 530; *Foley* v. *Township of East Flamborough* (1899), 26 A.R. 43; *Plant* v. *Township of Normanby* (1905), 10 O.L.R. 16; *Bloch* v. *Moyer* (1914), 7 O.W.N. 389, 830.

Judgment will be entered for the plaintiffs for $1,029.28, the value of the goods destroyed. The other elements of damages claimed are too remote. It is likely that under the conditions that have existed for 7 or 8 months, the plaintiffs may be quite as well off with the extra goods, if any, which they might have sold, remaining in their own warehouse.

*Judgment for the plaintiffs.*

SASK.

S. C.

## McGILLIVRAY v. BEAMISH.

*Saskatchewan Supreme Court, Haultain, C.J. January 16, 1915.*

1. GARNISHMENT (§ III—61)—PROCEDURE—DEFECTIVE AFFIDAVIT—EFFECT.

The omission in an affidavit for a garnishee summons before judgment under the Sask. Rules of Court to shew in what capacity whether as plaintiff, solicitor or agent for the plaintiff, the deponent makes his affidavit, is a ground for setting aside a garnishee summons issued thereon; the summons was a nullity as there was no proper affidavit and the defect in the latter was not a mere irregularity.

Statement

APPEAL from an order of a Local Master.

*L. B. Ring*, for applicants, defendants.

*A. L. McLean*, for respondents, garnishees.

Haultain, C.J.

HAULTAIN, C.J.:—The garnishee summons in question on this appeal was issued on an affidavit, the body of which was as follows:—

I, of , in the Province of Saskatchewan, , make oath and say:—

(1) That the above defendant is justly and truly indebted to the above-named plaintiff in the sum of $1,203.85 as appears by the statement of claim which is herewith produced and marked as exhibit "A" to this my affidavit, and that the said debt is still unpaid and unsatisfied.

(2) To the best of my information and belief the proposed garnishees are indebted to the above-named defendants.

The affidavit was signed "Thos. A. McGillivray" and was duly sworn on November 30, 1914. The garnishee summons was issued on the same day. The defendant moved to set aside the garnishee summons and the application was dismissed without costs by the Local Master at Saskatoon on December 21, 1914.

By his order, the Local Master permitted the affidavit to be "Taken off the file, corrected and resworn and returned." The affidavit was resworn on December 29, 1914, after the words "Thomas A. McGillivray," "City of Saskatoon," and "Agent" were added in the appropriate places.

The defendants now appeal on the following grounds:—

2. That the learned Local Master erred in holding that the omission complained of in the affidavit filed to obtain the issue of the garnishee summons herein, was such an omission as did not avoid the said affidavit. 3. That the learned Local Master exceeded the limits of his judicial discretion in allowing the plaintiff to remove the said affidavit from the files of the Court and amend the same. 4. That the learned Local Master erred in holding the said affidavit irregular only inasmuch as the said affidavit

does not shew that the deponent is the plaintiff or a judgment creditor, or the agent or solicitor of the plaintiff, nor that the deponent had any knowledge of the facts therein deposed to.

I think that the learned Master was quite within his discretion under Rules S.C. 423 and 747, in holding that the omission of the name, address and description of the deponent did not render the proceedings void. But the omission in the affidavit, even after being resworn, to shew in what capacity, whether as plaintiff, solicitor or agent, the deponent made his affidavit is, in my opinion, more than an irregularity. It is quite true that affidavits are often allowed to be resworn but that has been before and not after the proposed step has been taken. Rule 423 permits a Judge to receive an affidavit notwithstanding any defect by misdescription of parties or otherwise in the title and jurat or any other irregularity in the form thereof. In such a case a memorandum that it has been so received is usually made on the affidavit.

In the case of *Green* v. *Prior*, W.N. (86), 50, cited in the Annual Practice, 1914, p. 660, an affidavit in support of an application for injunction was sworn two days before the issue of the writ. The injunction order was made on the plaintiff's undertaking to have the affidavit resworn and filed. I would take it for granted that in this and any similar case the order would not actually issue until the affidavit was resworn and filed.

A garnishee summons is issued on præcipe upon the filing of the proper affidavit. The analogy is not complete, but, under the Rules of the Supreme Court, except by leave of the Court or a Judge, no order made *ex parte* in Court founded on any affidavit shall be of any force unless the affidavit on which the application was made was actually made before the order was applied for and was filed at the time of making the motion. In *Re King & Co.'s Trade Mark*, [1892] 2 Ch. 462, it was decided that an affidavit used on a motion but not filed until afterwards may be entered in the order as read, though the fact of its not having been filed has not been brought to the notice of the Court, *provided it does not interfere with the date of the order.*

In the case of *Whitehead* v. *Rhodes* (not reported), men-

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tioned in The Annual Practice, 1914, at p. 891, Hall, V.-C., held that—

an affidavit of service of notice of motion for attachment must be filed before the order is drawn up.

In that case the order was made on "production of the affidavit and an undertaking to file it."

I can quite understand a Judge allowing affidavits to be resworn or to be filed later than the rules require. All these things are done before the event. In this case there was practically no affidavit filed upon which a garnishee summons should have been issued and, in my opinion, the garnishee summons was a nullity.

It cannot, in my opinion, be made effective by an *ex post facto* order under which the original affidavit has been taken off the files, corrected, resworn and filed very nearly a whole month after the date of the summons.

The garnishee summons is, therefore, set aside with costs, and the plaintiff will pay the defendants their costs of their original application and of this appeal.

*Appeal allowed.*

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## WALTER v. ADOLPH LUMBER CO.

*Alberta Supreme Court, Walsh, J. March* 31, 1915.

1. INSOLVENCY (§ I—3)—WHAT CONSTITUTES—STATUTORY DEFINITION — ASSIGNMENT ACT.

A person is to be deemed insolvent within the meaning of the Assignments Act, Alta., if he does not pay his way and is unable to meet the current demands of creditors and if he has not the means of paying them in full out of his assets realized upon a sale for cash or its equivalent.

[*Warnock* v. *Kloepfer*, 14 Ont. R. 288, 292, 15 A.R. 324, 18 Can. S.C.R. 701, referred to.]

Statement

ACTION by an execution creditor to set aside a chattel mortgage.

*Frank Ford*, K.C., and *I. B. Howatt*, for plaintiff.

*S. S. Cormack*, for defendant.

Walsh, J.

WALSH, J.:—The plaintiff sues as an execution creditor of the defendant Strathcona Lumber Co. Ltd., to set aside a chattel mortgage made by it to the defendant Adolph Lumber Co. If the defendant mortgagor was at the date of this mortgage in in-

solvent circumstances—or unable to pay its debts in full or knew that it was on the eve of insolvency the mortgage cannot stand for it is clearly within sec. 41 of the Assignments Act. The mortgage which covers all of the mortgagor's assets was made to a creditor in security for its then existing liability to the mortgagee. It has the effect of giving the mortgagee a preference over the other creditors of the debtor and this action to impeach or set it aside was brought within 60 days from its date. Under sec. 41, read in the light of sec. 43, the mortgage is utterly void as against the plaintiff and other creditors of the mortgagor, but is not unless the mortgagor was at its date in one or other of the conditions above referred to.

The facts as to the mortgagor's circumstances are disclosed by the evidence of W. E. Ford, the president and general manager of the judgment debtor. The mortgage bears date, December 9, 1914. Mr. Ford's figures relate to the 5th of that month but he says that there would not be at the outside a difference of more than $200 in his company's condition between these two dates. He gives the assets at $26,250, made up as follows:—

Plant, buildings, office furniture, etc., $2,000; value of unexpired term of lease, $500; stock in trade at invoice prices, $7,800; book debts, $8,700; Leduc Lumber Co. notes, $5,100; goodwill, $2,000; cash in hand, $150—$26,250.

The company's liabilities as of this date he gives at about $11,200 so that his statement shews a surplus on paper of about $15,000 or more than two dollars of assets for every dollar of liability. The correctness of Mr. Ford's evidence was not questioned. Although he was called as a witness for the plaintiff the facts which he gave as to the assets and liabilities were brought out in cross-examination and he was not even re-examined as to them by counsel for the plaintiff. There is absolutely nothing therefore to cast suspicion upon the correctness of his figures no matter what doubts one may have as to the likelihood of the assets realizing within some thousands of dollars of the value set by him upon them. The propriety of including such items as value of the lease, $500 and goodwill, $2,000 is open to question, although as to the latter, see *Ottawa Wine Vaults Co.* v. *McGuire*, 24 O.L.R. 591, 8 D.L.R. 229, 27

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O.L.R. 319, 13 D.L.R. 81, 48 Can. S.C.R. 44. The other items are sworn to by Ford as of the actual value given to them as above. Of the book debts he says they are all good except, perhaps, $200 or $300, that about $1,500 of them have been collected since the 9th of December and the payment of a little better than $5,000 of them has been secured. The item "Leduc Lumber Co. notes, $5,100," occurs under peculiar circumstances. The maker of these notes is a company consisting practically of the same shareholders as those who are members of the Strathcona Lumber Co. The Leduc Co. was formed for the purpose of taking over from the Strathcona Co. its lumber yards and assets at Leduc and these notes represent the balance of the purchase price. This transaction is also impeached by the plaintiff, the two actions being tried together. If that action succeeds (and I have as yet formed no opinion respecting it) these notes will no longer be an asset of the Strathcona Co., but in their place will be the property for the purchase price of which they were given. For my present purpose, however, I must take the notes themselves as representing this asset. The assets of the Leduc Company at the date of the mortgage were valued at $5,400 but there is nothing to shew whether or not the notes with which I am now dealing constituted its only liability. These notes are payable $1,000 in one year, $2,000 in two years and the balance in three years from their date which was October, 1914. If that transaction is sustained no one can tell of course what the value of these notes will be at maturity and so I am reckoning them as an asset of no present worth.

Taking Mr. Ford's unimpeached evidence as a basis and making the allowances which appear to me to be reasonable, I should place the value of the assets as of December 9, 1914, at $16,780. I arrive at this by deducting 50 per cent, or $1,000 from the value of the plant, $500 for the value of the lease, 10 per cent. or $870 from the book debts, $5,100, the amount of the Leduc notes and $2,000 as the value of the goodwill. The stock in trade is that of a lumber company, and I think that it should be worth invoice prices. There is no evidence one way or the other as to this, and I therefore express but my own opinion of it in saying this. The amounts by which I thus reduce Ford's

valuation aggregate $9,470, leaving it at $16,780. There is no dispute whatever as to $11,200 being the aggregate of the liabilities, so that upon this valuation the assets exceeded the liabilities by $5,580 when this mortgage was given. Apart from these figures the facts bearing upon the question of solvency or insolvency are not many. The plaintiff's claim for about $2,000 was placed in its solicitors hands for collection and they wrote the defendant mortgagor for payment on the 4th of August, 1914. Other letters were written and personal interviews looking to the payment of the claim took place without result, and on the 20th of October an action was commenced to recover the same. A copy of the statement of claim in that action was left at the defendant's office on the 23rd of October, and although it was not served personally on any officer of the company I think it came to the attention of Mr. Ford very shortly after it was so left. On the 27th of October a chattel mortgage was given by the defendant mortgagor to the defendant mortgagee as security for the payment of the same debt and over practically the same property as is secured and covered by the mortgage now in question. On the 26th of November the first action was discontinued and another action commenced, in which both mortgagee and mortgagor were made defendants, for the recovery of the debt owing by the mortgagor and to set aside the chattel mortgage of the 27th of October. That mortgage was thought to be bad for technical reasons, and on the 9th of December it was discharged and the mortgage now in question given in its place. Then on the 31st of December this action was commenced to set aside the new mortgage, the plaintiff having in the meantime become an execution creditor of the mortgagor. During all of this time the Canadian Bank of Commerce was a creditor of the mortgagor for about $1,000, and to it the book debts were hypothecated. Other creditors were pressing for payment of their claims at this same time, and many of these claims were in the hands of solicitors. None of them were paid either in whole or in part except as to $200, the reason for it being as stated by Mr. Ford that he could not put his hands on the cash. On November 18, three weeks before this mortgage was given, one of these creditors placed in the sheriff's hands

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an execution against the goods and lands of the Strathcona company for $1,163.70, and since then the plaintiff's execution and those of four other creditors have come in. All of these executions are still in the sheriff's hands wholly unsatisfied, and they aggregate $5,229.08.

There is an interpretation of the word insolvent in the Sale of Goods Ordinance under which, if it was applicable to this case, the question of this company's insolvency would be settled beyond dispute. Under it, "a person is deemed to be insolvent within the meaning of this Ordinance who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due." That interpretation is however in terms restricted to that Ordinance and so cannot be applied here. I know of no other statutory definition of the word, nor do I know of any decision of our own Court interpreting it, so I must look elsewhere for authority upon the question.

The authority which more nearly than any other with which I am familiar is, in my opinion, binding upon this Court is *Warnock* v. *Kloepfer*, for it eventually reached the Supreme Court of Canada. In delivering the judgment of the Divisional Court, 14 O.R. at p. 292, Boyd, C., used the following language:—

> A man may be deemed insolvent in the sense of the Act if he does not pay his way and is unable to meet the current demands of creditors, and if he has not the means of paying them in full out of his assets realized upon a sale for cash or its equivalent.

In the Court of Appeal, 15 A.R. (Ont.) this definition is expressly concurred in by Osler, J., at p. 325, and by Burton, J., at p. 331. The other two Judges, Hagarty, C.J.O., and Patterson, J., while making no special reference to this interpretation of these words expressly stated their agreement with the judgment of the Divisional Court. I think therefore that I may safely say that the Court of Appeal unanimously approved of and adopted the language of the Chancellor which I have quoted. Unfortunately the reasons for judgment of the Supreme Court are not published, the only report of the case being the headnote which appears in 18 Can. S.C.R. at p. 701. It reads as follows:—

> Held, affirming the judgment of the Court of Appeal and of the Divi-

sional Court. Gwynne, J., dissenting that N. being unable to meet the demands of his creditors for payment must be deemed insolvent within the meaning of the said Act.

If this headnote correctly summarizes the judgment, the Supreme Court materially altered the Chancellor's definition of an insolvent under the Act for it omits all reference to the debtor's ability to pay his debts in full out of his assets. I cannot think that the Supreme Court adopted that view of the matter for it surely must be that the value and nature of a debtor's assets and the amount of his liabilities must always have some bearing and a very material bearing upon the question of solvency or insolvency. I take it therefore that the Supreme Court in affirming the judgments of the Courts below adopted the above quoted opinion of the Chancellor, and for this reason I think that I should apply his definition of insolvency to the facts of this case, the language of the Ontario Act there under discussion being in this respect identical with that used in our Assignments Act.

There are three things therefore that I must find before I can declare insolvency on the part of the judgment debtor at the date in question, namely, (1) that it was not paying its way; (2) that it was unable to meet the current demands of its creditors, and (3) that it had not the means of paying them in full out of its assets realized upon a sale for cash or its equivalent. These three conditions must co-exist for the Chancellor uses them conjunctively, not disjunctively. As to 1 and 2 there is no difficulty whatever. The judgment debtor was then unquestionably within both of them. I find myself however unable to hold upon the evidence before me that it had not then the means of paying its creditors in full out of its assets so realized upon. My finding upon that question must be the other way. The onus of proving insolvency is on the plaintiff and it has failed to prove it.

Under the authorities of which *Glegg* v. *Bromley*, [1912] 3 K.B. 474, is one of the latest, this transaction being merely a preference is not within 13 Eliz. ch. 5, and even if it was there is absolutely no evidence of that intent on the part of the mortgagee which must be established before the instrument could be set aside.

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The action is dismissed with costs, to the defendant mortgagee and without costs as to Stratheona Lumber Co. Limited.

*Action dismissed.*

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## DUSSEAULT v. KOPP.

*Saskatchewan Supreme Court, Newlands, J. February 12, 1915.*

1. PRINCIPAL AND AGENT (§ III—32)—CONTRACTS—PERSONAL LIABILITY OF AGENT.

The question whether an agent who has made a contract on behalf of his principal is to be deemed to have contracted personally, and if so, the extent of his liability on the contract, depend on the intention of the parties to be deduced from the nature and terms of the particular contract and the surrounding circumstances.

Statement

APPEAL from a judgment of a District Court Judge.

*H. V. Bigelow*, K.C., for plaintiff, appellant.

*J. W. Ward*, for defendant, respondent.

Newlands, J.

NEWLANDS, J.:—This is an application to strike out the defence as false, frivolous and vexatious. The action is on an agreement of sale signed by defendant. Defendant, in examination for discovery, admits his signature, but says he signed as agent for a syndicate, as the plaintiff knew. Mr. Bigelow, K.C., for plaintiff, cites *Higgins* v. *Senior*, 8 M. & W. 834, as authority to shew that defendant is liable in such a case. In that case there was nothing in the document to shew that defendant signed as agent, and the Court held that parol evidence could not be admitted to prove that fact, as that would be varying a written document by parol evidence. In this case, the written agreement shews that defendant was acting for other parties. After his name there is in brackets the words ("in trust for syndicate"). This case therefore differs from *Higgins* v. *Senior* upon the very point on which it is decided, and it is not therefore an authority for the proposition advanced. Bowstead on Agency, p. 360, in referring to contracts other than bills and notes and contracts under seal, says:—

> But no agent is personally liable on any contract made by him merely in his capacity of an agent (and)
> the question whether an agent who has made a contract on behalf of his principal is to be deemed to have contracted personally, and if so, the extent of his liability on the contract, depend on the intention of the parties to be deduced from the nature and terms of the particular contract and the surrounding circumstances.

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As to contracts under seal, the principle is different. At p. 367 Bowstead says:—

> Where an agent is a party to a deed and executes it in his own name, he is personally liable thereon, even if he is described in the deed as acting for and on behalf of a named principal.

The agreement in question states that the parties have hereunto set their hands and seal. There is a seal put on opposite the plaintiff's name, but none opposite the defendant's signature. His covenant to pay is, therefore, not by deed.

This case is therefore not one in which I can say that the defendant's defence of denial of liability on account of his acting as an agent is false, frivolous or vexatious, and therefore it should not be struck out on that ground.

The appeal is therefore dismissed with costs.

*Appeal dismissed.*

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## HALPIN v. VICTORIA.

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*British Columbia Supreme Court, Morrison, J. January 11, 1915.*

1. FIREWORKS (§ I—1)—FIREWORKS DISPLAY—LIABILITY FOR INJURIES.

In order to establish liability in negligence against those lawfully conducting a fireworks display in a public park for injury received from an ignited fragment, a failure on their part to exercise due care must be shewn.

[*Rylands* v. *Fletcher*, L.R. 3 H.L. 330, referred to.]

Statement

ACTION for damages for injuries.

*McDiarmid & Phelan*, for plaintiff.

*T. R. Robertson*, for defendants.

Morrison, J.

MORRISON, J.:—The plaintiff is an infant and brings this action by her next friend, William Halpin, her father.

Beacon Hill Park was entrusted to the City of Victoria, by grant dated January 21, 1882, for the purpose of using and maintaining it for the recreation and enjoyment of the public. For many years this park has been used by the citizens of Victoria, especially for celebrating what was known as the Queen's Birthday. In order the more adequately to effect this purpose, it has been customary for certain citizens to form themselves into a "Celebration Committee" which assumed the task and responsibility of managing the celebration and raising funds to defray the expenses incurred for any extra features deemed necessary for catering to the enjoyment of the public. One of

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these features, on the occasion in question, was a display of fireworks by Messrs. Hitt Bros., who, from the evidence, appear to be a well-known, reputable firm, who make a specialty of this sort of entertainment. Pursuant to the arrangements made with this firm by the committee, they sent a competent employee under whose sole control the display was given on the evening of May 25, 1914, which was the annual date set aside for perpetuating the celebration of the "Queen's Birthday." The plaintiff, accompanied by her parents, had, together with a large concourse of people, assembled to witness the fireworks. Policemen mounted and on foot patrolled the immediate grounds on which the fireworks were shewn. Portions of this area were roped off and where there were no ropes mounted police endeavoured to keep back the spectators. The plaintiff seems to have got away from her parents a short distance and, as I find as a fact, got within range of the spluttering piece which was then being displayed whereby she was struck by an ignited fragment and sustained the injuries in respect of which she now claims damages from the defendants.

Mr. McDiarmid, for the plaintiff, contended that the defendants must be held to have conducted the exhibition, because, pursuant to by-law, they contributed towards the celebration fund. This they were empowered by the legislature to do: *vide* sec. 161 of the Municipal Act. That being so, it seems to me, counsel must logically go further and contend that this power to contribute carries with it an implied obligation to conduct the celebration and to assume the responsibility therefor. Even in that case, the right of action would only arise in a case of negligence such as this is upon a breach of duty to exercise due care under the circumstances. Assuming that view to be sound, I find as a fact that due care was so exercised by the defendants.

Mr. McDiarmid also strove to apply the principle of *Rylands* v. *Fletcher*, L.R. 3 H.L. 330. I think that the facts in this particular case preclude the application of the principle in *Rylands* v. *Fletcher*.

Assuming I am wrong in that view of the law, I am of opinion that the city did not conduct the celebration and are no more liable to the plaintiff than are the others who contributed to the committee's fund. It follows, then, the action is dismissed.

*Action dismissed.*

## Re BEAN ESTATE.

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*Saskatchewan Supreme Court, Brown, J. February 5, 1915.*

1. EXECUTORS AND ADMINISTRATORS (§ IV C 2—113)—REIMBURSEMENT—RIGHT TO INTEREST.

Where it was not necessary for the realization of the estate for the administratrix to carry on the business as she did for sometime after the decedent's death, and the direction of his will was that the same should be sold and converted into money to be invested at interest, the administratrix may be allowed a reasonable amount for her services for carrying on the business which resulted in large profits, and may be allowed interest for the period during which the business was carried on to be computed at a reasonable rate on the amount of capital which the business represented at the testator's death, under a bequest to her of the "interest" on the fund to which the proceeds of the business belonged, but she is not entitled to take the entire profits as interest; the surplus profits are to be treated as belonging to the *corpus* of the estate.

Statement

APPEAL from an order of a Surrogate Court Judge.

*F. L. Bastedo*, for Official Guardian.

*F. W. Turnbull*, for administratrix.

Brown, J.

BROWN, J.:—A question arises in this case as to the meaning to be given to the word "interest" as used in the will of the testator. Now "interest" ordinarily used under such circumstances as these means the sum paid for the use of money, and I cannot see anything in the will or any circumstances surrounding the case that requires or justifies any different definition for that word as used in this will. That being so, the will necessarily contemplates that the business and the farm which were owned by the deceased at the time of his death should be converted into money, and the money duly invested in interest-bearing securities. Of course, had it been necessary for the proper and efficient realization of the business and the farm that the business should be conducted and the farm operated for some time after the death of the deceased, the administratrix would be quite justified in so conducting the business and operating the farm for such time as would be considered reasonable for that purpose. That question, however, does not arise at all in this case. The administratrix, in continuing the business and operating the farm, did something which she was not authorized to do in law, even though it was done in the best of good faith and apparently with good results. She has unquestionably, according to the material, continued this business with success, and shewn ability

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in the conduct of the same. The result is that large profits have been made, and the question, therefore, that now arises is whether these profits belong to the corpus of the estate or should be regarded simply as "interest" within the meaning of that term as used in the will. A number of authorities were cited to me in the course of the argument, more especially the cases of *Stroud* v. *Gwyer*, 28 Beav. 130, *Slade* v. *Chaine*, 77 L.J. Ch. 377, and *In re Hoyles*, 81 L.J. Ch. 163. I have read these authorities and others carefully, and have reached the conclusion, not, however, without some hesitation, that the profits in question, both from the store and the farm, cannot be regarded as interest, but must be considered as increased capital, and, therefore, as belonging to the *corpus* of the estate. To hold otherwise would require the meaning of the word "interest" to be enlarged beyond anything contemplated by the testator, and would, moreover, enable the administratrix to profit by what must be regarded as a breach of trust. Having reached this conclusion, the order of the learned Surrogate Court Judge will require amendment. It was agreed by counsel on the argument of this case that in the event of my reaching the conclusion which I have reached, the matter should be spoken to in Chambers and the form of order agreed to by consent. It was further admitted by counsel that in preparing this order provision should be made that interest on the original capital at a reasonable rate should be deducted from the profits and treated as interest and not as belonging to the *corpus*. It was also admitted that the administratrix should be allowed a reasonable amount for her services in carrying on the business and in operating the farm as she has done. These points will, therefore, be dealt with when the matter is again spoken to.

I have already indicated that in reaching the above conclusion I am not free from doubt. The matter seems to me to be of sufficient importance, and the amount involved is sufficiently large, to justify the matter being brought before the Court *en banc*, so as to avoid the possibility of any injustice being done. In the event of counsel desiring to bring this matter before the Court *en banc*, I will allow the appeal to be taken to this coming Sittings of the Court if notice of appeal is given not later than Monday next, or even later than that if opposing counsel consent.

I will say further that it does not seem to me that in this case there is any necessity of having any evidence either printed or typewritten; that if a copy of the will and this judgment and notice of appeal are typewritten, that will be sufficient material to constitute the Appeal Book. The question of costs, of course, will be dealt with when the matter is further spoken to.

*Order varied.*

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## GREER v. CANADIAN PACIFIC R. CO.

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*Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Davies, Idington, Duff, Anglin, and Brodeur, JJ. May 4, 1915.*

1. LIMITATION OF ACTIONS (§ II F—60)—RAILWAY FIRES—OPERATION OF RAILWAY.

The burning of worn-out ties by a railway company on its right of way in performance of the duty imposed by sec. 297 of the Railway Act R.S.C. 1906, ch. 37, to keep the right of way free from unnecessary combustible matter, any damage or injury resulting therefrom is caused by reason of the "operation of the railway" within the meaning of that phrase in sec. 306, the right of action for which accrues within one year.

[*Greer* v. *C.P.R. Co.*, 19 D.L.R. 140, 32 O.L.R. 104, affirmed.]

2. RAILWAYS (§ II D 7—75)—FIRES FROM RAILWAY OPERATION—LIMITATION OF ACTION—DUTIES UNDER PROVINCIAL STATUTE.

The Dominion Railway Act, R.S.C. 1906, ch. 37, sec. 306, prescribing a time limitation for actions for fires resulting from the construction and operation of railways, does not in any wise diminish or affect liabilities arising out of a breach of statutory duty under a Provincial statute regulating the prevention of fires.

Statement

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario, 19 D.L.R. 140, 32 O.L.R. 104, affirming the judgment at the trial, 19 D.L.R. 135, 31 O.L.R. 419.

*Laidlaw*, K.C., for appellant.

*MacMurchy*, K.C., for respondents.

Sir Charles Fitzpatrick, C.J.

SIR CHARLES FITZPATRICK, C.J.:—Both Courts below have found on the admissions of the parties that this claim is for damages arising out of an injury sustained by the plaintiff by reason of something negligently done in the operation of the railway and that the limitation of sec. 306, sub-sec. 1, R.S.C. (1906), ch. 37, applies.

For the reasons assigned by the Chief Justice in the Court below I am of opinion that the judgment appealed from should be confirmed with costs.

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DUFF, J.:—I concur with the Court of Appeal in the conclusion that the direct and effective cause of the damages in respect of which the action is brought was the conduct of the company's servants in the "operation of the railway." I do not think it is wise to attempt to lay down any criterion other than that supplied in the clause itself for determining what cases are within the words "construction or operation of the railway." The present case, I think, is near the line but within it. I think counsel for the railway company was right in the opinion he expressed that nothing in sec. 297 or in the accompanying sections does in any way modify the common law responsibility of the company in making use of fire for the purpose of clearing its right-of-way.

And I am far from satisfied that there is any evidence in the record which would justify the conclusion that what was done by the company's servants was done in the intended exercise of any power impliedly conferred by that section. I do not think, however, that this necessarily excludes the application of sub-section 1 of sec. 306.

As to sub-sec. 4 of this section, this sub-section read literally would deprive sub-section 1 of all effect except in those cases in which the cause of action is not given under provincial law. That result would follow because it is obvious that the obligation (*ex delicto*) created by the company's wrong whether you look at it from the point of view of the person of incidence or of the person of inherence is "affected" by limiting the time within which the accessory right of action vested in the person of inherence may be exercised even in Canada alone. It is therefore impossible to deny that if you are to give the words of sub-sec. 4 their full value, when literally read, you must limit the operation of sub-section 1 to causes of action which do not arise under the provincial law.

But sub-sec. 4 is one of those sweeping general sections that one finds in the Railway Act, which must be applied cautiously and with reasonable regard to the broad canon of construction that such sweeping provisions are not generally to be read as displacing particular provisions with regard to particular subjects to which when literally read they are repugnant. That is

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the view of the earlier enactment (which for all relevant purposes was the equivalent of sub-sec. 4) that was taken in the *Canadian Pacific R. Co.* v. *Roy*, [1902] A.C. 220. Sub-sec. 4 and sub-sec. 1 must be read together, and sub-sec. 4 given such effect as leaves it open to us to give a reasonable construction to sub-sec. 1. I may add that it does not appear to me to help us very much to say that sub-sec. 1 only affects the remedy and not the right. It seems indeed improbable that Parliament should have contemplated limiting the exercise of the plaintiff's right of action in Canadian Courts while leaving subsisting the obligation—capable of enforcement, of course, in other Courts; yet such would be the effect of holding that sub-sec. 1 is a provision relating only to the procedure. An injured passenger, who by lapse of time had lost his right to sue in the Canadian Courts, might sue in New York or in Chicago, and in the case of Dominion railways that course might present very little inconvenience.

Moreover, as regards causes of action given by provincial law only, it appears to me that it would be arguable that a Dominion enactment relating only to procedure would be *ultra vires*.

Anglin, J.

ANGLIN, J.:—The only question which arises on this appeal is whether the defendant company is entitled to the benefit of the limitation afforded by sub-sec. 1 of sec. 306 of the Railway Act, R.S.C. 1906, ch. 37. The plaintiff's property was damaged by fire which escaped from the defendants' right-of-way. The fire was started by the defendants' servants to consume worn-out and discarded ties or sleepers, and it is admitted that its escape to the plaintiff's property was attributable to their negligence. Subject to what is to be said as to the effect of sub-sec. 4, I am of the opinion, for the reasons assigned by the learned Chief Justice of Ontario and Middleton, J., that sub-sec. 1 of sec. 306 affords a defence to the plaintiff's action. It should, I think, be presumed that the purpose in view in burning the ties was to discharge the duty of freeing the right-of-way from combustible material imposed on the company by sec. 297 of the Railway Act. No evidence was given at the trial, the facts being admitted. The learned trial Judge proceeded with-

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out objection on the assumption that the burning of the ties was in intended fulfilment of the statutory duty of the defendants—with "an intention to carry on the railway in good faith." In the Appellate Division the judgment proceeds on the same basis of fact and it should not now be departed from. The resultant damages sued for were, therefore, in my opinion, sustained "by reason of the construction or operation of the railway."

Although the use of fire for the destruction of inflammable material on the right-of-way is not expressly authorized by the Railway Act, it is common knowledge that it is a means which is most efficient and which it is customary to employ, and I cannot think that its use for that purpose entails liability unless accompanied by negligence which causes injury. No doubt there are other methods of fulfilling the duty imposed by sec. 297; and it may be that, under some circumstances, the use of fire would be so highly and so obviously dangerous that it would in itself afford *primâ facie* evidence of negligence. But I am unable to accede to the view that for that reason a railway company in burning old ties on its right-of-way is not discharging a duty imposed by sec. 297, or that it thereby assumes responsibility of the kind and degree to which the defendant in *Rylands* v. *Fletcher*, L.R. 3 H.L. 330, was held to be subject.

Nor does sub-sec. 4 exclude the application of sub-sec. 1, of sec. 306 to the present case as the plaintiff contends. First enacted by 20 Viet. ch. 12, sec. 17, as part of "An Act for the Better Prevention of Accidents on Railways," the prototype of sub-section 4 was, of course, confined in its application to the several sections of that statute. They provided for the inspection of railways and reports thereupon to the then Board of Railway Commissioners. The words "under this Act" and "anything in this Act contained" in sec. 17 had thus a restricted reference. It is scarcely necessary to state that the limitation provision now found in sub-sec. 1 of sec. 306 was not a part of ch. 12 of 20 Viet. When the Railway Act was consolidated in 1859, as ch. 69 of the Consolidated Statutes of Canada, sec. 17 of ch. 12 of 20 Viet. was brought into it as sec. 190, the words "under this Act" and "in this Act" being retained, perhaps inadvertently, with the result, if they should be given full

effect, that the scope and application of the section was enormously extended. But it still remained one of a group of sections relating to inspections and reports of accidents, and it was so continued through 31 Viet. ch. 68, sec. 40, 42 Viet. ch. 9, sec. 52, and R.S.C. (1886), ch. 109, sec. 80, until the revision of 1888, when it first appears, in ch. 29 of 51 Viet., in proximity to the limitation section, No. 287, yet as a separate section, No. 288, and under the heading, "Company not relieved from legal liability by inspection or anything done hereunder." As originally enacted and (substantially) as it stood until 1906 the language of the section was:—

No inspection had under this Act nor anything in this Act contained or done or ordered or omitted to be done or ordered under or by virtue of the provisions of this Act shall relieve or be construed to relieve any railway company of or from any liability or responsibility resting upon it by law . . . for anything done or omitted to be done by such company, or for any wrongful act, neglect or default, misfeasance, malfeasance or nonfeasance of such company, or in any manner or way to lessen such liability or responsibility or in any way to weaken or diminish the liability or responsibility of any such company under the existing laws of the province.

When so worded it was still reasonably clear, notwithstanding its presence in the general Railway Act, that the section had no reference to the limitation provision, which neither relieved from, lessened, weakened, or diminished any liability or responsibility of the railway company. While it stood as a separate section in the Railway Act of 1888, this provision was relied upon before the Judicial Committee in *C.P.R. Co.* v. *Roy*, [1902] A.C. 220, at p. 228, for the proposition that, although Parliament had authorized the use of steam locomotives by railway companies, this section expressly maintained the liability of the company, which it was claimed existed under provincial law, for damages caused by employing such locomotives "in the ordinary and normal use of the railway" and without negligence.

Dealing with this argument the Lord Chancellor said (at p. 231):—

Section 288 is more plausibly argued to have maintained the liability of the company, notwithstanding the statutory permission to use the railway; but if one looks at the heading under which that section is placed, and the great variety of provisions which give ample materials for the operation of that section, it would be straining the words unduly

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to give it a construction which would make it repugnant, and authorize in one part of the statute what it made an actionable wrong in another. It would reduce the legislation to an absurdity, and their Lordships are of opinion that it cannot be so construed.

It was not until 1903 that what is now sub-section 4 was appended to the limitation section as sub-section 3 (3 Edw. VII. ch. 58, sec. 2). It, however, still substantially retained its original form. It was only in the revision of 1906 that it assumed the form in which we now find it:—

No inspection had under this Act, and nothing in this Act contained, and nothing done or ordered or omitted to be done or ordered, under or by virtue of the provisions of this Act shall relieve or be construed to relieve, any company of or from, or in anywise diminish or affect any liability resting upon it under the laws in force in the province in which such liability or responsibility arises, etc.

The substitution of the word "affect" for the former words "lessen or in any way weaken," in my opinion, does not alter the applicability or effect of the sub-section. It remains a provision dealing with liability or responsibility. Sub-sec. 1, on the other hand, does not deal with, or in any way "diminish or affect" liability or responsibility. Unlike the Real Property Limitation Act, but like the Limitation Act of King James I., it only bars the remedy by action or suit. The liability remains intact and unaffected and may be made available by the person having a right to indemnify for any damages or injuries sustained if he should have an opportunity to set it up without resort to an action or suit: *Wainford* v. *Barker* (1697), 1 Ld. Raymond 232; *Curwen* v. *Milburn*, 42 Ch.D. 424, at p. 434. With due respect for the draftsmen of 1903 and 1906, sub-sec. 4 should not be found in the same section with sub-sec. 1 of sec. 306. Historically there is no connection between the two; they have no bearing one upon the other; and there collocation is misleading.

Moreover, having regard to its history and to the view taken of it in *C.P.R. Co.* v. *Roy*, [1902] A.C. 220, I think sub-sec. 4 cannot be construed as maintaining or re-establishing a responsibility or liability against which the authorization conferred by sec. 297, in respect of acts done in the *bonâ fide* discharge of the duty which it imposes, affords immunity. Of course the liability for negligence remains; but to that the limitation of

sub-section 1 of sec. 306 must apply unless we should treat sub-sec. 4 as rendering it nugatory and thus "reduce the legislation to an absurdity."

The plaintiff also invoked sec. 4 of the Ontario Forest Fires' Prevention Act (R.S.O. (1897), ch. 267). It was admitted that the fire which caused the damage was set out on or about July 15, and that a proclamation had been issued under sub-section 1 declaring the district to be a fire district under the statute. Assuming, in the plaintiff's favour, that in the burning of ties in the discharge of their duty under sec. 297 of the Railway Act, the defendant company was subject to this provincial legislation (*C.P.R. Co.* v. *Notre Dame de Bonsecours*, [1899] A.C. 367, and *Grant* v. *C.P.R. Co.*, 36 N.B. Rep. 528, at pp. 533, 545), it does not help him. Sec. 15 of the Forest Fires' Prevention Act was as follows:—

> Nothing in this Act shall be held to limit or interfere with the right of a person to bring and maintain a civil action for damages occasioned by fire, *and such right shall remain and exist as though this Act had not been passed.*

The only effect which this legislation could have would be to render it unnecessary for the plaintiff to prove negligence, breach of statutory duty causing damage being his cause of action. But, although the starting of the fire contrary to the provisions of sec. 4 of the Forest Fires' Prevention Act should entail civil responsibility for any injurious consequences, notwithstanding that the defendants were acting in the discharge of their duty under sec. 297 of the Railway Act, the damages suffered by the plaintiff were nevertheless sustained "by reason of the construction or operation of the railway," and would, therefore, come within sub-section 1 of sec. 306, which, as already pointed out, does not "in any wise diminish or affect any liability or responsibility under" the provincial statute.

I am, for these reasons of the opinion that this appeal fails and should be dismissed with costs.

BRODEUR, J.:—This is an action where we have to construe sec. 306 of the Railway Act, which provides that an action or suit for indemnity for any damage or injury sustained by reason of the construction or operation of a railway shall be com-

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menced within one year next after the time such supposed damage is sustained.

Some old ties had been removed from respondents' railway and had been piled to be burned. When they were so burned the fire started over the land of the appellant and he has taken an action for damages more than a year after the damage had been sustained.

The respondents claim that this destruction of the ties was, under sec. 297 of the Railway Act, the fulfilment of a duty imposed by that section. That sec. 297 provides that the company shall maintain its right-of-way free of dead dried grass, weeds and other unnecessary combustible matter.

There is no doubt that those old ties were combustible matter and that they had to be removed from the right-of-way. Was it necessary, however, to burn them, or should they not have been removed in some other way?

On that point the evidence is not given, as to the way the track should be kept clear, but the trial Judge stated that it was found that it was a custom of the railway company that decayed ties were burned upon the right-of-way. Then if the company was fulfilling a duty which was imposed on it by the Railway Act it might be stated that the burning of those ties was part of the operation of the railway and the damage which might be caused as a consequence of the carrying out of that duty should be claimed within one year after the damage had been sustained.

It is not, after all, a very serious hardship for those who might claim those damages. The liability of the company under the common law is not restricted because in one case as in the other they are bound to pay the damages which their negligence might cause. The only difference is that in one case it is provided that those damages should be claimed within one year after the damage had been sustained.

For these reasons, the judgments of the Courts below which applied the Statute of Limitations as enacted by sec. 306 of the Railway Act should be confirmed and the appeal dismissed with costs.

Davies, J.
Idington, J.
(dissenting)

DAVIES, and IDINGTON, JJ., dissented.

*Appeal dismissed with costs.*

## CRICHTON'S LIMITED v. GREEN.

SASK.

S. C.

*Saskatchewan Supreme Court, Lamont, J. January 30, 1915.*

1. LANDLORD AND TENANT (§ III D 1—99)—INCOMPLETE LEASE—LIABILITY FOR RENT—CESSATION OF—SURRENDER OF POSSESSION.

If the agreement for a lease is one of which specific performance will be ordered, the t[enan]t holding under such agreement is not merely a tenant from year [to] year but stands in the same position as to liability as if the lea[se] had been executed; so where the tenant had not been given possess[ion] of all of the premises in pursuance of the agreement and the landl[ord] would in consequence be disentitled to specific performance, the tenant may repudiate the agreement and, on doing so promptly and vacating the premises, will not be liable for rent except for the time of his actual occupation.

[*Lowther* v. *Heaver*, 41 Ch. D. 248, referred to.]

Statement

ACTION for recovery of rent under an agreement to lease.

*H. D. Pickett*, for plaintiff.

*H. S. Lemon*, for defendant.

Lamont, J.

LAMONT, J.:—Notwithstanding the vigorous argument by Mr. Pickett in this action, I am of opinion that it must be dismissed. By an agreement in writing, dated January 14, 1913, the plaintiff agreed to lease and the defendant agreed to take a lease off the plaintiff of a store on Fairford St. together with 15 feet of the basement the full width of the store, for 2 years at a rental of $175 per month. The building was then being erected, and the lease was to be entered into as soon as the premises were completed. Before the basement was completed the defendant moved into the store. This was on May 21, 1913. As soon as the basement was completed, which was at the end of that month, he wanted possession of the basement and a key therefor. The plaintiff allowed him to put his goods in the basement, but did not give him at that time the key; but they also put bolts on the inside of the basement door and kept that door bolted. The defendant had no entrance to his basement from his store, but had to enter from the cellar hall. The defendant's basement connected on the inside with the plaintiff's basement, so when the plaintiff bolted the door the defendant could not enter his portion thereof until the plaintiff went down and opened the door. At 6 o'clock at night the plaintiffs were in the habit of closing their store. The defendant was in the confectionery business and kept open until midnight. The use of the basement until he closed was of material importance to him. The reason the plaintiffs

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kept control of the defendant's portion of the basement was because they desired to use the defendant's basement as a passage way for goods to their own basement, and because they said they had silverware in their own basement, their's being a jewelery business, and they could not take the risk of leaving the defendant's basement unlocked as there was only a board partition between the two. They not only refused to give the defendant exclusive possession, but in their evidence admitted that they intended to continue to use the defendant's basement as a passage way for their goods.

The defendant kept insisting upon the terms of the agreement and notified the plaintiffs on July 29 that unless he received a lease and legal possession of the portion of the basement as set out in the agreement he would move from the premises. In their statement of claim the plaintiffs allege that on or about August 14, they tendered to defendant a lease upon the premises under the agreement, but the defendant refused to execute it. The defendant admits the tender of the lease and alleges that he refused to execute it because he could not get the possession of the basement. The plaintiffs put in evidence of a tender of the lease, but did not produce the lease so that it could be determined whether or not it was in accordance with the terms of the contract. As the plaintiffs admit that they intended to continue the use of the defendant's portion of the basement as a passageway for their goods I take it that that lease did not convey to the defendant exclusive possession of that portion of the basement which was to be his under that agreement. The onus was on the plaintiffs to prove that the lease tendered corresponded with the agreement, and they failed to prove it. The defendant moved out and the plaintiffs now sue for the rent subsequently falling due.

The principle of law governing the right of one party to a contract to treat the contract at an end for breach by the other party of its provisions is laid down by Lord Coleridge, C.J., in *Freeth* v. *Burr* (1874), L.R. 9 C.P. 208, as follows:—

> In cases of this sort, where the question is whether the one party is set free by the action of the other, the real matter for consideration is whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon and altogether refuse performance of the con-

tract. I say this in order to explain the ground upon which I think the decisions in these cases must rest. There has been some conflict among them. But I think it may be taken that the fair result of them is as I have stated; that the true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract.

The statement of law as laid down by Lord Chief Justice Coleridge was approved of by the House of Lords in *General Bill-posting Co. Ltd.* v. *Atkinson*, [1909] A.C. 118.

In *Rhymney R. Co.* v. *Brecon & M.T. R. Co.*, 49 W.R. 116, Lord Alverstone says:—

It will be well to consider in the first instance what conduct on the part of one party to a contract justifies the other party in treating it as at an end. If there is a distinct refusal by one party to be bound by the terms of a contract in the future, the other party may, in our opinion treat the contract as at an end.

Was there then in this case a distinct refusal on the part of the plaintiffs to carry out the terms of their contract, which entitled the defendant to a lease of the basement as well as the store premises? Unquestionably, I think there was. They not only kept control of the basement, but declared that they could not give exclusive control thereof to the defendant. Its use was most material to him, and their refusal to leave the door unbolted so that the defendant could use it at will, and their using it as a passage way to their own basement, indicated in the clearest manner an intention not to be bound by the agreement they had entered into under date of January 14. The defendant, therefore, was justified in considering the contract at an end and moving out. With the contract at an end, the action for subsequent rent must fail.

The argument addressed to me by Mr. Pickett was this: That where a tenant, under an agreement to lease, entered and paid rent, he was in the same position as if the lease had been executed, and he cited 18 Hals. 441, which reads:—

Thus, upon an entry under an agreement for a lease, followed by payment of rent, the tenant becomes a yearly tenant upon such of the terms of the agreement as are consistent with that tenancy.

Now, it will be observed here that what is necessary in order to make that statement of the law applicable is an entry under an agreement for lease. Now in this case there was not an entry under the agreement for lease as was contemplated by the agreement. The whole trouble, so far as the defendant was concerned,

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was that he was not allowed to enter, that he could not get exclusive possession of the basement. It, therefore, becomes necessary to ascertain under what circumstances an agreement for a lease imposes upon the tenant the same obligation as if the lease had been executed. In *Walsh* v. *Lonsdale*, 21 Ch. D. 9, Sir George Jessel, M.R., laid the rule down in the following language:—

> A tenant holding under an agreement for a lease of which specific performance would be decreed, stands in the same position as to liability as if the lease had been executed. He is not since the Judicature Act, a tenant from year to year, he holds under an agreement, and every branch of the Court must now give him the same rights.

In *Lowther* v. *Heaver*, 41 Ch. D. 248, Cotton, L.J., says:—

> Speaking for myself, I should say that a tenant occupying under an agreement of which a Court of Equity would grant specific performance, has the same rights as if the lease had been granted.

The condition, therefore, upon which a tenant will be held to have the same rights and be under the same obligations as if the lease had been granted is that he enters under an agreement of which specific performance would be ordered. And that principle seems to be laid down in the volume of Halsbury referred to, at p. 367, where the learned author in dealing with agreements for leases, says:—

> If, however, a question of the legal rights and liabilities of the parties arises in a Court which has jurisdiction to order specific performance of the agreement, and if the agreement is one of which specific performance will be ordered, then the parties are treated as having the same rights, and as being subject to the same liabilities as if the lease had been granted.

Would any Court have granted to the plaintiff as against the defendant specific performance of the agreement in question? In my opinion most assuredly it would not. In order to obtain specific performance the plaintiffs would have to plead and shew that they had been at all times, and were still ready to perform all the obligations which the contract cast upon them. In this case the evidence shews that they were not, that they never had been, and were not at the time they brought the action ready and willing to perform the obligations under the contract devolving upon them. They were not ready to give the defendant exclusive possession of the basement as called for in the agreement, and I think the following sentence in the paragraph relied upon by Mr.

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Pickett throws considerable light upon the principle applicable, where it says:—

> And the agreement so far controls the implied tenancy that the tenancy ceases without notice to quit at the end of the agreed term.

In my opinion the logical conclusion to be drawn from that is that, if the agreement is one of which not only shall specific performance not be granted, but which the defendant was entitled to treat as at an end the implied tenancy must fall with the agreement. The position taken by the plaintiffs is simply this. They practically say to the defendant, "True, we entered into an agreement for a lease by which you were to get the exclusive possession of the store and of the basement. Subsequently we found that it was necessary for our own business that we should keep control of the basement and we are not, therefore, willing now to carry out that contract, nevertheless, you have got to go on and pay your rent, and for whatever damages you suffer you may bring an action for damages." That position I do not think is sound either in law or morals. There will, therefore, be judgment for the defendant with costs.

*Judgment for defendant.*

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## WALKER v. CARD.

ALTA.

S. C.

*Alberta Supreme Court, Harvey, C.J. January 26, 1915.*

1. INTEREST (§ I C—25)—INTEREST ON PURCHASE PRICE—AGREEMENT OF SALE OF LAND—ENFORCEMENT.

> In fixing the amount to be paid by the purchaser for a conveyance in a vendor's action to enforce an agreement of sale on the purchaser's default in payment, interest after default should be allowed under the Judicature Ordinance, Alta., sec. 10, clause 15, unless there is in the facts some equitable ground for withholding it in cases where the contract does not expressly provide for interest *post diem;* for although the word "may" is used in that enactment in declaring the power on the court to award interest on money "improperly withheld" if it seems to the court fair and equitable to allow it, it becomes the duty of the court to award interest when of that opinion and to fix the rate.
>
> [*Toronto R. Co.* v. *Toronto*, [1906] A.C. 117, considered.]

ACTION for the payment of interest on purchase price. Statement

*R. D. Tighe*, for plaintiff.

HARVEY, C.J.:—This is an action against the purchaser of land for the balance of the purchase money. On application for judgment before the Master he gave the usual judgment for Harvey, C.J.

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specific performance giving the defendants four months to redeem without giving any personal judgment against them, and allowing the plaintiff no interest on the purchase moneys after default until the commencement of the action, after which he allowed interest at 5 per cent. This is an appeal with respect to interest only.

The clause in the agreement reserving interest following the covenant to pay the purchase price is as follows:—

> Together with the interest thereon at the rate of eight per cent. per annum on the days and times in manner above mentioned.

Now, assuming that this does not constitute an agreement to pay interest after default clearly the purchaser ought to pay the purchase money when due, both because he has promised to do so and because he has not promised to compensate by payment of interest if he fails.

The payment may, therefore, be quite aptly said to have been "improperly withheld" in the terms of clause 15 of sec. 10 of the Judicature Ordinance as enacted by sec. 1 of ch. 20 of 1908, which is as follows:—

> 15. In addition to the cases in which interest is by law payable, or may by law be allowed, the Court may in all cases where in the opinion of the Court the payment of a just debt has been improperly withheld, and it seems to the Court fair and equitable that the party in default should make compensation by the payment of interest, allow interest for such time and at such rate as the Court may think right.

In *Toronto Railway Co.* v. *City of Toronto*, [1906] A.C. 117, a case under the Ontario statute which provided that

> interest shall be payable in all cases in which it is now payable by law or in which it has been usual for a jury to allow it (it was held) that in all cases where in the opinion of the Court the payment of a just debt has been improperly withheld and it seems to be fair and equitable that the party in default should make compensation by payment of interest it is incumbent upon the Court to allow interest for such time and at such rate as the Court may think right.

It is apparent that the words of our statute are taken expressly from this decision, the only difference being that the statute says "the Court may allow" and the judgment says "it is incumbent for the Court to allow."

I am of opinion that there is no difference in meaning in this particular case, for even if "may" should not be construed as meaning "shall," it is apparent that it is the Court's duty to do

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what seems to it to be fair and equitable, and, therefore, if it seems to it to be fair and equitable to allow interest it ought to allow it, since the power is given it to do so. In the present case I can see no equitable ground for withholding interest.

The plaintiff has been deprived of his money and the defendants have had the use of it and there is nothing to shew that the plaintiff has had any compensation. As to the rate, the parties agreed that 8 per cent was a fair rate before default and it ought to be more rather than less after, since the vendor might be put to much inconvenience by not receiving it when expected. Moreover, the financial conditions which have arisen by reason of the war since the agreement of the parties and which have existed since the default renders 8 per cent. a reasonably low rate. I am of opinion, therefore, that the plaintiff ought to be allowed the same rate after default as before and that the defendants should only be entitled to a conveyance upon payment of interest at that rate until the time of such payment.

The appeal will be allowed with costs and the decree of specific performance amended as above indicated.

*Appeal allowed.*

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## THE KING v. THE "DESPATCH."

CAN.

Ex. C.

*Exchequer Court of Canada (British Columbia Admiralty District), Hon. Mr. Justice Martin, Local Judge in Admiralty. June 18, 1915.*

1. ADMIRALTY (§ II—5)—PRACTICE—ACTION BY CROWN—SECURITY—STAY OF PROCEEDINGS—CONSOLIDATION OF ACTIONS.

In an action by the Crown against a ship for damages for a collision and a cross-action *in personam* by the owner of the ship against the master of a government tug for damages resulting from the same collision, the Admiralty Court will entertain a motion for a stay of proceedings until security for judgment is given by the Crown, or for a consolidation of the actions.

2. CROWN (§ II—20)—ACTION BY—ORDERS OF COURT—BINDING EFFECT ON CROWN.

Where the Crown invokes the jurisdiction of the court as a plaintiff, the court may make all proper orders against it.

Statement

MOTION for stay of proceedings against the Crown.

*Richard C. Lowe*, for plaintiff.

*E. C. Mayers*, for the ship.

Martin, L.J.A.

MARTIN, L.J., IN ADM.:—This is a motion under sec. 34 of the Admiralty Courts Act, 1861, by the owners of the defendant

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ship to suspend the proceedings in this cause by the Crown against said ship for damages for collision to the Canadian Government tug "Point Hope" until the Crown has given security to answer a judgment which the defendants hope to recover in a cross cause *in personam* begun by them against one W. D. McDougal the master of the said tug "Point Hope," and servant of the Crown, for damages alleged to have been caused by said tug under his command to the said ship "Despatch" in the same collision upon which this action is brought, and also that it may be ordered that the two actions shall be tried at the same time and upon the same evidence. The defendant ship "Despatch" has been arrested and bailed, but the "Point Hope" being a King's ship cannot be arrested (*The Comus* (1862), Dods. 464; *The Athol* (1842), 1 W. Rob. 374), nor the Crown sued for damages caused thereby, so the officer in charge has been sued *in personam*—Roscoe's Adm. Prac. (1903), 178 (note 1) 302; Williams & Bruce Adm. Prac. (1902), 89, 262; *Hettihewage* v. *The Queen's Advocate* (1884), 9 App. Cas. 571, 586; *H.M.S. Sans Pareil*, [1900] P. 267; *H.M.S. King Alfred* (1913), 30 T.L.R. 102; and *H.M.S. Hawke*, 29 T.L.R. 441, [1913] P. 214. I pause to observe that in the case of the *Lord Hobart* (1915), 2 Dods. 180, a packet in the service of H.M. Post Office, but belonging to private individuals was arrested, to answer a claim for wages, the Post Office having no objection to such a course in cases of that kind and having dispensed with the customary notice.

The Crown has refused in this action to give security after demand therefor.

If the Crown were not a party there would be no answer to the application, and, indeed, it was only opposed on the point on which I desired further argument and authority, viz., as to whether or no it was proper to stay an action by the Crown and so in effect to compel it to give security in its own Court. Counsel have been unable to direct my attention to any case exactly in point, but have referred me to the following authorities: Adm. Rules 33 and 34; Howell's Adm. Prac., 26; Roscoe's Adm. Prac. (1903), 178, 324; Williams & Bruce, Adm. Prac. (1902), 370-2; *The King of Spain* v. *Hullet* (1833), 1 Cl. & F. 333; *The Cameo*

(1862), Lush. 408; *Prioleau* v. *United States* (1866), L.R. 2 Eq. 659; *The Charkieh* (1873), L.R. 4 Ad. & E. 120; *Secretary of State for War* v. *Chubb* (1880), 43 L.T. 83; *Hettihewage* v. *The Queen's Advocate, supra; The Newbattle* (1885), 10 P.D. 33; *Regina* v. *Grant* (1896), 17 Prac. (Ont.) 165; and *Carr* v. *Fracis Times & Co.*, [1902] A.C. 176 (*The Sultan of Muscat's* case). I extract from them the general rule, well stated by Osler, J.A., in *Regina* v. *Grant, supra* (where the question was one of dispensing with a jury), that as regards procedure "the Crown, coming into the High Court is in the same position as the subject" just as, on the other hand, as Burton, J.A., put it (p. 167) when in that Court

> the Queen . . . cannot be entitled to less rights than those of the meanest of her subjects (and) I do not think the rights of the defendants are abridged or enlarged by reason of the plaintiff in the case being the Sovereign.

Osler, J.A., further remarked on said p. 169:—

> It might have been thought that without the aid of any special enactment, the mode in which the remedy of the Crown would be pursued and the relief sought, administered, would be in accordance with the course and constitution of the forum selected as between subject and subject, so that the Crown, coming into a forum in which, as between subject and subject, trial by jury had ceased to be the general mode of disposing of issues of fact, except in certain specified cases, would be bound to follow, or would have the right to take advantage of, the prescribed practice in order to obtain a jury or to deprive the defendant of his claim for one.

There is an exception, of course, where the dignity of the Crown might be affected, as in the case of the Attorney-General not being required to made discovery on oath, cited in *Prioleau* v. *United States, supra*, p. 664. But in my opinion no question of that kind arises here, and by analogy I cite this language of their Lordships of the Privy Council in the *Hettihewage Case, supra*, p. 589:—

> The Crown suffers no more indignity or disadvantage by this species of defence than it would suffer by defences of a more direct kind, which yet would be clearly admissible; as, for instance, if a breach of contract sued on by the Crown were excused on the ground that the wrongful action of the Crown itself had led up to that breach.

This was held even in a case where it was said, p. 588:—

> It is true that the course taken by the Courts below does practically give an effective execution against the Crown to the extent of the Crown's claim against the defendants. But though the Crown is thereby prevented

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from recovering its debt, it is not exposed to the indignity attendant upon process of execution.

In the case of the *A.-G.* v. *Brooksbank*, 1 Y. & J. 439, the Courts stayed proceedings on an information filed by the Attorney-General against army agents to account to the Crown for certain moneys until certain documents were produced by the War Office; and in the *Secretary of State for War* v. *Chubb*, *supra*, the Court refused to grant the plaintiff an injunction unless the Crown gave the usual undertaking in damages, Jessel, M.R. saying, in answer to the objection "that the Crown could not be bound in such an undertaking:—

> I can see no reason for making an exception in favour of the Crown in a matter of common and universal practice. If the Crown cannot give the usual undertaking in damages, I cannot grant the interim injunction.

If this case had been one brought by a foreign prince instead of by our own Sovereign I should not have reserved judgment, because the former when he comes as a suitor is only acknowledged as a "private individual": *Prioleau* v. *United States*, *supra;* and as Brett, M.R., said in *The Newbattle*, *supra*, p. 35:—

> It has always, however, been held that if a sovereign prince invokes the jurisdiction of the Court as a plaintiff, the Court can make all proper orders against him. The Court has never hesitated to exercise its powers against a foreign government to this extent.

It was said in *The King of Spain* v. *Hullet*, *supra* (p. 353),, that "the practice of the Court is part of the law of the Court," and in *The Cameo*, *supra*, Dr. Lushington said "the intention of the Act was to put the two contending parties on a fair footing," and this can only be done in the present circumstances by allowing the present application, with costs to the defendant in any event, as the request for security was refused. It is desirable to add that quite apart from the statute the matter is obviously one where the two actions should be consolidated under rules 33 and 34, and as a matter of precaution I make an order to that effect it having been conceded that the cases should be tried together.

*Motion granted.*

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*Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. April 19, 1915.*

1. MASTER AND SERVANT (§ I C—10)—ILLNESS OF SERVANT—RIGHT TO WAGES.
A head waiter in a hotel is as a servant entitled to his wages or salary during absence through temporary illness, provided that the contract of service remains in existence during that time, and that he is ready and willing to carry out his duties save for the incapacity produced by the illness; but the illness of the servant may so go to the root of the consideration as to justify the master in rescinding the contract.

2. MASTER AND SERVANT (§ I E—22)—DISMISSAL OF SERVANT—GROUNDS—INSUBORDINATION.
A servant may be summarily dismissed if he is insulting and insubordinate to such a degree as to be incompatible with the continuance of the relation of master and servant.

Statement

APPEAL from the judgment of the trial Judge in a wages action.

*J. F. Gyles*, for appellant, plaintiff.

*A. J. Symington*, for respondent, defendant.

Cameron, J.A.

CAMERON, J.A.:—This action is brought by the plaintiff to recover wages alleged to be due him by the defendant company, and for damages for wrongful dismissal. The plaintiff was employed as head waiter of the private or banquet service of the Fort Garry Hotel, and later as head waiter of the grill room (in which capacity he was serving at the time of his dismissal), receiving therefor the sum of $85 monthly, except during the months of September and October, 1914, when the sums of $49.36 and $48.17 were deducted. During these months the plaintiff had been absent from his duties owing to illness. In addition to these sums the plaintiff claims as damages the balance due for November, 1914, after his dismissal, $51, and $85 for one month's wages in lieu of notice. For the defence it is alleged that the defendant company is not liable to pay wages for the period when the plaintiff was absent through physical disability, and that the plaintiff was properly dismissed by reason of his insolence or impertinence to the manager of the hotel.

According to the plaintiff his contract with the defendant company as head waiter was at $85 monthly, with the privileges set forth in the letter dated September 11, 1913, from Mr. Louis Low, then superintendent of service and afterwards assistant manager of the hotel. These privileges included pay during illness. But this letter was not written as an offer of a position to the plaintiff.

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As a matter of fact the plaintiff did not enter the service of the defendant company until the hotel was opened, December 10, 1913. Moreover, it would seem that the privileges as to sick pay refers to "waiters," and not necessarily to "captains." Independently of this, I think the question as to sick pay must be considered apart from the letter, which cannot, by its very terms, be made part of this contract. The law as to the right of a servant to pay during absence from his master's employment through illness is not very clearly defined, as pointed out by Mr. Justice Killam in the judgment to which I refer later.

In Cyc. XXVI., p. 1044, it is stated that "ordinarily no recovery is allowable for the time which the employee loses during his sickness or other disability." But, though this is the law in the United States, it is not considered by the writer of the article to be such in England, as is indicated by the footnote to the above page.

In *Cuckson* v. *Stones*, 1 El. & El. 248, the plaintiff, a brewer, was employed by the defendant for ten years, receiving £20 down, and a house and coal, with a weekly sum of £2 10s. 5d. The plaintiff was absent through illness for several months, and the defendant refused to pay him for that time, but retained him in his service. It was held that the contract being in force there was no suspension of the weekly payment by reason of the plaintiff's illness. It was said by Lord Campbell, at p. 256:—

> But, looking to the nature of the contract sued upon in this action, we think that want of ability to serve for a week would not of necessity be an answer to a claim for a week's wages, if in truth the plaintiff was ready and willing to serve had he been able to do so, and was only prevented from serving during the week by the visitation of God, the contract to serve never having been determined.

In *K.* v. *Raschen*, 38 L.T. (N.S.) 38, the Court considered that illness was to be taken as *primâ facie* an act of God, and that the plaintiff was entitled to say that it was a reasonable excuse for his absence from his duties and to judgment accordingly: *per* Cleasby, B., at p. 40. In *Warren* v. *Whittingham*, 18 T.L.R. 508, it was held the plaintiff was entitled to his salary owing to illness, following *Cuckson* v. *Stones*, which, as Mr. Justice Bruce said, had never been questioned.

The law on the point is thus stated in Hals., vol. XX., at p. 85:—

A servant is entitled to his wages or salary during absence through temporary illness, provided that the contract of service remains in existence during that time, and that he is ready and willing to carry out his duties save for the incapacity produced by the illness.

Mr. Justice Killam examined the authorities on this subject in *Dartmouth Ferry Commission* v. *Marks*, 34 Can. S.C.R. 366, commencing at p. 376. The majority of the Court in that case held that the illness, which in that case terminated fatally, was of such a nature as to go to the root of the contract and put an end to it. Mr. Justice Killam, who differed from the majority in the grounds of his decision, in discussing the contract there in issue, says:—

The modern principle is to endeavour to ascertain from an examination of the whole contract what was the real intention of the parties; but if it appears that it was the performance and not the promise that was to constitute the consideration for the counter promise, this still gives rise to the presumption that performance was intended to be a condition precedent. (Page 382.)

But this is subject to the qualifications implied in the cases referred to by him.

As the employee does not warrant the continuance of his physical ability to work, he does not contract absolutely, and at all events to do so. Disability due to illness excuses him. And since his promise is so qualified, strict and full performance of service is not a condition precedent to the right to wages. (Page 383.)

Mr. Justice Davies says also, at p. 374:—

The law permits the latter (temporary sickness) on the ground of common humanity to be offered as an excuse for not discharging duty temporarily, and suffers the disabled party to recover damages for the time he is temporarily away from his work.

The subject is discussed in Labatt, Master and Servant, vol. II., sec. 521, p. 1497:—

In some of the older English text books and decisions, it is laid down that if the servant fall sick, or is otherwise disabled by the act of God, the master must not abate any part of his wages for the time during which he was incapacitated. But the later authorities shew that this doctrine is subject to some limitations, the precise extent of which has not yet been determined with precision.

One limitation is where the servant's illness has been such as to justify his discharge, and he has been, in fact, discharged. A second is found in case of weekly hirings, and reference is made to *Miller* v. *Morton*, 8 Man. L.R. 1, but this exception is questioned. A third is where the disability is so prolonged that the master's interests require a substitute to be hired. In Labatt's

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work, *Cuckson* v. *Stones*, 1 El. & El. 248, and *Warren* v. *Whittingham*, 18 T.L.R. 508, are referred to (p. 1498); also *Goode* v. *Downing*, 5 Terr. L.R. 505 (where Mr. Justice Scott followed *Cuckson* v. *Stones*), and *Dartmouth Ferry Commission* v. *Marks*, at p. 1499, and again at p. 1502.

In *Colman* v. *Naish*, 28 W.L.R. 487, Swanson, Co.J., held, upon consideration of the authorities, that a servant is entitled to his wages during absence through temporary illness, provided the contract of service remains in existence and that the servant is ready and willing to carry out his duties save for the incapacity.

In the case before us it was sought to establish a general rule of the employment that an employee should be paid only for the actual time that he is on duty. If such were the case the sole question to be determined would be whether the plaintiff had notice of it: see Labatt, at pp. 1501 and 1502. In this case he had not; on the contrary, he was under the impression that he was entitled to his wages when absent through illness. After his illness he returned to his employment, and proceeded to press his claim for payment of the amounts deducted when he became aware of them and was able to approach the manager.

The conclusion is that under the law as it stands the right of the plaintiff to recover the amounts which were deducted has been established. His illnesses were of a temporary character; the contract of employment continued to subsist throughout until his dismissal, and his absences became excused because of his disability.

With reference to the other branch of the case, the hotel manager says that the superintendent of service told him that he was having trouble with the plaintiff, who had been insolent to him. The superintendent said that the plaintiff blamed him (the superintendent) for the deductions made from his wages. The manager told the plaintiff that these deductions were made by his instructions. The manager then told the superintendent his duties in case of insolence, and the plaintiff said, "I will take it over your head," whereupon the manager said to the superintendent, "Dismiss him at once." There had been a previous occasion in September when a guest had reported the plaintiff for alleged insolence, but this had not interfered with his connection with the hotel, and had been condoned by the management,

which in such a case is subject to an implied condition of future good conduct: *McIntyre* v. *Hockin*, 16 A.R. (Ont.) 498, 502.

It is difficult to lay down any general rule as to what causes will justify the discharge of a servant which shall comprise and be applicable to all cases; since whether or not a servant in any particular case was rightfully discharged, much of course often depends upon the nature of the service which he was engaged to perform and the terms of his engagement.

Smith on Master and Servant, p. 97, quoted with approval by Bramwell, B., in *Horton* v. *McMurtry*, 5 H. & N. 667. See also *McIntyre* v. *Hockin*, *supra*, at p. 502.

A servant may be summarily dismissed if he is insulting and insubordinate to such a degree as to be incompatible with the continuance of the relation of master and servant. (Halsbury XX., p. 100.)

Reference is there made to *Edwards* v. *Levy*, 2 F. & F. 94, which was cited and followed in *Williams* v. *Hammond*, 16 Man. L.R. 369. The subject is discussed in Labatt at p. 930 *et seq.*, where a large number of cases are cited. A protest entered on the minutes of a public company by a clerk against the entry of a letter received by him that it was the company's intention to make a new appointment was held by the jury, to whom the question was put, sufficient ground for his dismissal: *Ridgway* v. *Hungerford Market Co.*, 3 Ad. & El. 171. The finding of the jury was upheld, as the act of the clerk was inconsistent with his employment.

As the various kinds of language and behaviour which constitute a breach of the duty now under discussion are described by terms which are not susceptible of any precise legal definition, the question whether in any given instance, a breach was committed, is essentially one of fact and therefore primarily for the jury. (Labatt, p. 932.)

In this case we must recognize the necessity of strict discipline amongst the employees of a large hotel. We have also the finding of the trial Judge, sitting as a jury, on a question of fact when he had the advantage of having the witnesses before him. I am certainly not prepared to say that he was wrong in his finding, and would not interfere with his judgment on this branch of the case. But, I do think the plaintiff is entitled to recover the amounts withheld from him in September and October, being $97.53. The plaintiff is entitled to his costs of this appeal and in the County Court.

HAGGART, J.A.:—On September 11, 1913, one Low, then in the employ of the defendants, in reply to a letter of the plaintiff

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written on August 11 previously, stated some of the advantages which hotel employees enjoyed in this country over those in New York as to wages, treatment and other matters. Amongst other statements made in that letter is the following: "Off-duty days paid for, also in case of sickness as long as it lasts."

The plaintiff contends that this representation should be made a stipulation in the contract made two or three months afterwards under which he went into the service of the defendants.

This letter is written upon the letter paper of the defendants, but there is nothing in it to shew that Low acted, or assumed to act, on behalf of the defendants. The letter is written more than two months before the expected opening of the hotel. It is a letter from one friend to another, and Low further goes on to state:—

> As a brother Mason, I would advise you to take anything that comes along and leave it to me for the future. It won't be long before you climb up, in less than a year.

I do not think it would be right to hold the defendants to any such stipulation as the above, notwithstanding the fact that the plaintiff claims he came from New York on the inducements held out in this letter, and the further fact that De Roubille, the resident manager, says that Louis Low was the superintendent of service at the time of the opening of the hotel, and further that he knows

> that Mr. Low was given charge of the engaging of dining room staff and that was left entirely to him; that was given to him by Mr. Bergman, who was superintendent of the hotel.

It is not shewn, or claimed, even, that this letter, or the statements above referred to, were in the minds of Low and the plaintiff when the contract of hiring was consummated after the opening of the hotel.

There remains still the serious question whether in such a contract of hiring there is implied by law a liability to pay for services while the servant is, through sickness, incompetent to perform his duties.

The case generally cited as a leading authority is *Cuckson* v. *Stones*, 1 E. & E. 248. There the plaintiff was employed as an expert brewer for ten years. The defendants were to pay him a lump sum in advance and weekly wages, and to furnish him with a house and with coals for the whole term. About a year from the

end of the term the plaintiff became ill, and continued so for about seven months, during which time he was unable to personally attend to the business, but gave advice to the defendants, who consulted him from time to time. The defendants paid the wages for some months of the period of illness, and, upon the plaintiff's recovery, he went on with his work and was paid as before. It was admitted that the contract was not determined, and upon general principles it was admitted also that it was one entire contract, and that the performance of the service was not a condition precedent to the liability to pay. Lord Campbell says:—

We concur in the observation of Willes, J., in *Harmer* v. *Cornelius*, 5 C.B.N.S. 236, and if the plaintiff from unskilfulness had been wholly incompetent to brew, or by the visitation of God he had become, from paralysis, or any other bodily illness, permanently incompetent to act in the capacity of brewer for the defendant, we think the defendant might have determined the contract. He could not be considered incompetent by illness of a temporary nature; but if he had been struck with disease so that he could never be expected to return to his work, we think the defendant ought to have dismissed him and employed another in his stead. Instead of being dismissed, he returned to the service of the defendant when his health was restored, and the defendant employed him and paid him as before. At the trial the defendant's counsel admitted that the contract was not rescinded. The contract being in force, we think that there was no suspension of the weekly payments by reason of the plaintiff's illness and inability to work. It is allowed that under this contract, there could be no deduction from the weekly sum in respect of his having been disabled by illness from working for one day of the week; and while the contract remained in force, we see no difference between his being so disabled for a day or for a week or for a month.

The above was given as the opinion of the Court, and I cannot find that these views have ever been questioned by any Court. In fact, the case is cited as an authority by Mr. Justice Davies and Mr. Justice Killam in *Dartmouth Ferry Com.* v. *Marks*, 34 Can. S.C.R. 366.

In the case before us the hiring was a verbal one, and I take it that the promise to pay was the consideration for the promise to perform the service. In the case last referred to the contract for service was in writing, and the deceased husband of the plaintiff, his executrix, agreed to serve the defendants at a monthly wage of $60 per month in the capacity of captain of a ferry. The plaintiff's husband became ill, and was confined to the house for three or four months. The physicians who attended him thought that the illness was temporary. However, it turned out that the illness was of a fatal nature. Mr. Justice Davies held that this

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permanent disablement ended the contract. The consideration which moved the Commission to promise wages was gone. Mr. Justice Killam, who also gave his reasons, disposed of the case on another ground, namely, that the answers given by the jury to certain questions were not warranted by the evidence: see *Beale* v. *Thompson*, 3 B. & P. 405; *Chandler* v. *Grieves*, 2 H. Bl. 606 n.

20 Hals., p. 84, discusses this subject as follows:—

> Sec. 161: A servant is entitled to his wages or salary during absence through temporary illness, provided that the contract of service remains in existence during that time and that he is ready and willing to carry out his duties, save for the incapacity produced by the illness. . . . But the illness of the servant may so go to the root of the consideration as to justify the master in rescinding the contract.

Citing as authority for these propositions the cases that I have above referred to.

In the case before us the defendants had not determined the contract of hiring. The illness was only temporary, and after his recovery he resumed the performance of the duties of his usual work. I think I would hold that the plaintiff is entitled to recover the amount withheld by reason of illness, the sum of $98.06.

Having arrived at this conclusion with reference to his right to the wages during sickness, I have in a measure determined the next question arising, namely, whether the defendants had a right to discharge the plaintiff and had good reason for so doing.

It is not claimed that the plaintiff was inefficient or neglected his duties in any way; the reason given for his discharge is that he insisted upon claiming the sum which I have found him entitled to. There was no insolence or disobedience or other misconduct in the performance of his duties as a head waiter. I do not think the manager was justified in dismissing him as he did.

Then, in lieu of notice what should he be entitled to receive? In the case of domestic servants there is a consensus that two weeks' wages is sufficient. In the absence of authority I think I would allow two weeks, or half a month, namely, $42.50, which I would add to the above sum, making the total verdict $140.56.

Mr. Justice Killam, in discussing the above matters, says: "There is a singular dearth of clear authority respecting the effect of the disability of an employee arising from illness upon the right to wages and determining or giving the right to determine

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the contract of service." I would add to this observation that there is not that uniformity of decision in the various cases which we would like to find to enable us to reach a satisfactory conclusion.

I would allow the appeal and enter a verdict for the plaintiff for the above amount.

HOWELL, C.J.M., and PERDUE, J.A., concurred with CAMERON, J.A.

Howell, C.J.M.
Perdue, J.A.

RICHARDS, J.A., dissented.

Richards, J.A. (dissenting)

*Appeal allowed.*

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## Re CIMONIAN.

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S. C.

*Ontario Supreme Court, Meredith, C.J.C.P. May 19, 1915.*

1. ALIENS (§ II—7)—NATURALIZATION—ALIEN ENEMIES.

An alien enemy is not within the provisions of the Naturalization Act, R.S.C. 1906, ch. 77, and application for naturalization under that Act, if it appears that the applicants are alien enemies, may be refused upon the judge's own initiative, though no opposition has been filed and no objection offered.

[*The King* v. *Lynch*, [1903] 1 K.B. 444, and *Porter* v. *Freudenberg*, [1915] 1 K.B. 857, followed; *In re Herzfeld* (1914), 46 Que. S.C. 281, disapproved.]

APPLICATION for naturalization in Canada, under the provisions of the Naturalization Act, R.S.C. 1906, ch. 77. Statement

*M. A. Secord*, K.C., for the applicants.

No one opposed the applications.

MEREDITH, C.J.C.P.:—Among the naturalization papers, presented at the recent Waterloo Spring Assizes, were the thirteen now being dealt with. Upon perusing them, I found that twelve of the applicants were described as formerly of Armenia, and one of them as formerly of Macedonia; and, as no more information was given as to the sovereign or state to whom or which they now owe allegiance, it seemed very probable that they were all Turkish subjects, and so alien enemies. Meredith, C.J.C.P.

Being of, and expressing, the opinion that an alien enemy was not within the provisions of the Naturalisation Act, R.S.C. 1906, ch. 77, I retained the papers, in each of these matters, and gave leave to each applicant to give such evidence as he could, and should see fit to, give upon the question whether he is or is not an alien enemy; and to Mr. Secord, who appeared on behalf

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of all the applicants, I gave liberty to present any such argument, oral or written, as he might see fit to present, in support of the contention that an alien enemy is entitled to "naturalisation in Canada" under the enactment in question.

No further evidence has been given, nor has any further argument been presented, but I am very much indebted to the Department of the Secretary of State for Canada, and especially to the Under Secretary, for an expression of the views of the Department upon the subject, and for very much light thrown upon it generally.

Naturalisation in these cases is sought under the provisions of the enactment I have mentioned, and rightly so, if the affidavits of the applicants are true; for, although that enactment has been repealed by the Naturalisation Act, 1914, 4 & 5 Geo. V. ch. 44 (D.), it has, by sec. 34, been kept alive for three years in regard to aliens resident in Canada on the 1st day of January, 1915, who comply with the requirements of the earlier enactment; and that these applicants, according to their affidavits, all were, and all have done, and so are entitled to naturalisation if they are not alien enemies, or, if alien enemies, are entitled to its benefits.

In all respects, in each case, the formalities of the enactment in question have been observed, except in the insufficiency of the statements of former residence—which would not be material now if the Act be applicable to foe and friend alike; "no opposition has been filed to the naturalisation" of any of them, and "no objection thereto" was "offered during the sittings;" and so, in time of peace, the certificate of each applicant would have been directed to be filed of record in the Court, and certificates of naturalisation in Canada would thereupon have issued in due course; but I cannot think that the Act is applicable alike to subjects of countries at enmity and in amity with the British Empire, and so withhold the direction which would entitle the applicants to naturalisation certificates.

As my right to consider such a question has been raised, it may be well to read, from the enactment itself, the provisions respecting the "presentation of the certificate" and to consider that question first:—

"19. Except in the Provinces of Saskatchewan and Alberta, presentation of such certificates shall be made in open court and on the first day of some general sittings of the court, and thereupon the judge shall cause the particulars of all such certificates to be openly announced in court, the name, residence, and occupation or addition of each applicant for naturalisation being stated.

"2. Where no opposition has been filed to the naturalisation of an applicant, and no objection thereto is offered during the sittings, the court on the last day of the sittings shall direct that the certificate of the applicant be filed of record in the court.

"3. If such opposition has been filed or objection offered the court shall hear and determine the same in a summary way, and shall make such direction or order in the premises as the justice of the case requires."

It is obvious from these words, and from the purpose and whole scope of the enactment, that it is the duty of the judge to satisfy himself in regard to these things: that the papers comply with the requirements of the Act and that the case is one within its provisions, and also that the proper notice has been given and posted: and all that having been done, and if there be no opposition or objection to the naturalisation of the applicant, it is the judge's duty to give the directions provided for in the section; if there be opposition, or objection, then he must deal with the whole case judicially and "make such direction or order in the premises as the justice of the case requires."

The contention that the judge cannot concern himself with the question, whether the applicant is or is not within the provisions of the Act, is too plainly erroneous to require refutation. No judge has a right to act in any matter until assured of his authority. If the Act exclude an alien enemy, what excuse would there be for giving him the benefit of it, knowing him to be an alien enemy, or without proper inquiry into the question? A slovenly method of letting the certificate of naturalisation go for what it might be worth, might be dangerous, and in any case would be inexcusable.

It is quite true that the judge is not concerned with the

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merits of any case which is within the Act, and in which there is no opposition or objection; but that could not excuse him for any neglect of his other duties, especially the duty to take care that every one he passes on to naturalisation—to the status of a British subject in Canada—is one to whom the Act, authorising such naturalisation, is applicable.

If an alien enemy be not entitled to naturalisation under the Act in question, then it is plainly the duty of these applicants —Armenian and Macedonian—to shew that they are not alien enemies, to shew that they are not excluded from the benefits of the enactment.

In dealing with naturalisation matters, an alien enemy is the subject of a nation which is at war with the nation in which naturalisation is sought; and that too is the general meaning of the words; and an alien friend in any part of the British Empire is a subject of a nation in amity with that empire.

It is true that sometimes, for some purposes, an alien enemy is treated as if, and called, an alien friend, and even a British subject is treated as and sometimes called an alien enemy: see *Porter* v. *Freudenberg*, [1915] 1 K.B. 857; but that is really not correct, though quite convenient in the cases in which it occurs, actions to recover money or property, in which the test is not whether the plaintiff is an enemy or friend or alien or subject, but is, to what use the money or property may be put if the Court should aid in its recovery; to a British subject living in the country which is at war with the British Empire, no aid will be given, the enemy might be benefited; to an alien enemy living in the Empire with the license of the King to trade there, or with any proclamation or other authorisation tantamount to it, aid will be given, because the money or property recovered cannot be available to the enemy, but may be to the Empire. It is obvious that a British subject by merely living in an enemy country—sometmes he cannot get out—does not become an alien enemy; if he should, he would be a traitor and liable to be hanged.

If a Turkish subject, each of these applicants is, and must be treated as, an alien enemy, in the consideration of his case.

Then is the earlier enactment applicable to an alien enemy?

Before considering the provisions of the enactment alone, with a view to answering that question, it is important to have in mind some indisputable facts bearing upon the subject: first, the fact that the concurrence of the "three Estates of the Realm" is necessary for the lawful admission of an alien into British allegiance; that nothing short of an Act of Parliament can authorise the naturalisation in Great Britain, or in Canada, of any person. The power of the King to grant letters of denizenship, or liberty to trade, is, it need hardly be said, a thing of a character quite different from and one which falls far short of power to grant naturalisation: second, that war revolutionises the relationship existing between nations in peace, as well as the rights and privileges of an alien turned by war from an alien friend into an alien enemy. It has been said, by an eminent Judge, that an alien enemy is not *civiliter mortuus*, that he is under disabilities, and disabilities which may be largely removed by the King's license; and that is so, but still he remains an alien enemy: and third, that naturalisation is a thing which no nation, in its own interests, should confer upon an alien enemy except with the utmost circumspection and caution, whilst very different considerations might apply to the case of an alien friend.

Then coming to the provisions of the Act in question: its main features, bearing on the question under consideration, are, first, the ease with which naturalisation in Canada can be accomplished; second, the provisions of sec. 24, under which the person naturalised is not to be deemed a British subject when "within the limits" of the State of his former allegiance, unless he has ceased to be a subject of that State under its laws or under a treaty or convention to that effect; and, third, the provisons of sec. 12, permitting naturalisation of a British subject, in a foreign State, under which he is to be deemed, in Canada, to have "ceased to be a British subject and shall be regarded as an alien."

Having regard to all these things, is it not inconceivable that the provisions of this enactment were intended to be applicable to nations at war with the British Empire? Inconceivable that

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its provisions could have been meant to apply to alien friend and alien foe entirely alike?

If it be so applicable, then, notwithstanding all the criminal laws of great stringency against treason and traitors, it expressly permits treason of the most flagrant character—it invites and enables traitors to array themselves against the British Empire—all they need to do is to go over to the enemy's country.

And, if so applicable, it turns a naturalised British subject into an enemy whenever his foot is upon the land of his former allegiance unless expatriated under its laws or conventions. So that, when he may be compulsorily fighting in a Canadian army under the provisions of the Militia Act of Canada, in and against the land of his former allegiance, the Act in question converts him into a subject of that land.

And, if intended to be so applicable, is it within the range of possibility that Parliament would have neglected to provide some stricter mode of dealing with an application of an alien enemy, and so, sometimes doubtless, with a spy, than the easy and easily misused method—easy and easily misused even if applicable to alien friends only—by which naturalisation may be obtained under this enactment.

Naturalisation in Canada has been, during the more than half a century under which it has been under my observation, really little, if anything, more than a matter of form. It could hardly be more than that having regard to the easy method by which it was attainable under the Act in question: affidavits of the applicant's residence and allegiance; a certificate of a Commissioner for taking affidavits, a Justice of the Peace or Notary, or any other of the numerous persons authorised by the Act to give it, without any power in the Court to interfere unless some one opposed or objected in the manner before mentioned—a thing which in all my experience never happened. So that, if the Act be applicable to an alien enemy, it is something like an invitation to spies to provide themselves with the cloak of concealment which its provisions supply, giving to them aid in Canada, and, that which is worse, credentials which, in other parts of the Empire, are likely to be accepted, and relied upon with confidence.

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Apart from judicial authority upon the subject, I should have no difficulty in considering the Act in question inapplicable to an alien enemy, and the cases upon the subject seem to me to support, abundantly, that conclusion.

The case of *The King* v. *Lynch*, [1903] 1 K.B. 444, is a somewhat recent case expressly in point under the 12th section of the Act. The ruling was that the provisions of a similar section in the Imperial enactment are not applicable in time of war, and so Lynch was found guilty of treason for doing that which the section expressly permits, but which, upon a proper interpretation of the Act, permits in time of peace only.

And, if that section of the Act be applicable in time of peace only, how can the other provisions of the Act, to which I have especially referred, be applicable in time of war? If it be treason for a British subject to become naturalised in an enemy country, can it reasonably be said that it is not equally treason for a subject of a State at war with the British Empire to become naturalised in Canada during the war?

That eminent writer upon the subject of Nationality, and upon other kindred subjects, Chief Justice Piggott, seems to have no doubt that the effect of the decision in the case of *The King* v. *Lynch* is that an alien enemy could not be naturalised in Great Britain, under the laws in force in Great Britain when that case was decided, laws precisely like those in question upon these applications: see Piggott on Nationality, p. 137.

In the Province of Alberta, Harvey, C.J., with, I understand, the concurrence of all the other Judges of the Supreme Court of that Province, approving of the opinion expressed in Piggott on Nationality, made a general ruling against the naturalisation of any alien enemy, a ruling in all things in point in these cases.

The statute-law of the United States of America has always, I believe, contained some expressed provision against the naturalisation of an alien enemy; yet the cases in the Courts of that country are not without some bearing upon the question here involved, even though the enactment in question contains no such expressed provision.

In *Ex p. Newman* (1813), 2 Gall. (U.S.) 11, which was a case

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of an application for permission to file the preparatory declaration for naturalisation two years before the final proceeding could be had, it was said, in refusing it: "The petitioner is an alien enemy, and therefore has no legal standing in Court to acquire even inchoate rights."

In *Ex p. Overington* (1812), 5 Binn. (Penn.) 371, an opposite conclusion was reached on the same point; but it seems to me to be plain that the opinion expressed, by Mr. Justice Story, in the case of *Newman*, is the preferable one.

And in the case of *Ex p. Little* (1812), 2 Bro. (Penn.) 218, the whole subject was fully and well dealt with. The application in that case was under a provision of the naturalisation laws to which the expressed provision against naturalisation of an alien enemy was not applicable, yet a majority of the Court found no difficulty in applying such a rule to that case as a fundamental principle of the law respecting expatriation and naturalisation. The learned Chief Judge stating in clear and forceful language the main reasons for that paramount underlying principle, namely, the impropriety of conferring citizenship, or the status of a subject, upon one who could not be claimed as a citizen or subject if he fell into the enemy's hands; the impropriety of any nation being a party to an act which might be treated as treason in the other party to that act, and which, if done by a subject of such nation, would be treason according to the laws of that nation; and the danger of admitting to the bosom of the nation an alien enemy in the stress and embitterment of actual warfare; the danger of the nation taking a viper to its breast.

Opposed to these direct rulings, and weighty indirect considerations, I am aware of one judicial opinion only, a ruling upon the very point, by Archambault, J., in a Circuit Court of the Province of Quebec: *In re Herzfeld* (1914), Q.R. 46 S.C. 281. In the month of October last, that learned Judge considered, to use his own language, that "the quality of German or Austrian aliens, in the present state of affairs, is not an obstacle to their naturalisation in Canada," under the enactment now in question. And his conclusions were based upon these three grounds, namely: (1) article 23 (*b*) of the Hague Convention

of 1907; (2) that his functions, acting under sec. 19 of the Act in question, were merely "administrative," and so incapacity of an alien enemy to take suit did not apply; and (3) that, when commissioners or other duly authorised persons have administered the oaths of residence and allegiance and given their certificates, a Judge, acting as before mentioned, had no power to refuse to do his part in the naturalisation proceedings.

So that it is quite plain that the learned Judge did not consider in any manner the first and paramount question, whether the Act in question is at all applicable to an alien enemy; that he assumed that it was applicable to friend and foe alike, and acted in the cases before him accordingly; therefore, if his judgment stood alone, notwithstanding the great importance of uniformity of decision throughout Canada upon the subject, indeed the great importance of uniformity of laws and practice throughout the Empire upon the subject, I would not be justified in merely following his ruling. And, apart from that question, I am bound to disregard it, even if I agreed with him in the result, because the other authorities to which I have referred, one of them the Court of Criminal Appeals in England, require that my conclusion should be the opposite of that reached by him. So, too, as I have shewn, my conclusion, quite apart from the authorities, on the question whether the Act is applicable to an alien enemy or not, must have been the opposite of his; must have been that no alien enemy can be naturalised in Canada under the provisions of the Act in question; and I feel bound to add that I am also unable to agree with him in any of the three grounds upon which his judgment is based.

As to the first of them, an unusually full Court of Appeal in England has held that the clause of the Hague Convention relied upon by the learned Judge is inapplicable to England; and, if so, must be inapplicable to Canada; and so the learned Judge's view of it is directly overruled: see *Porter* v. *Freudenberg*, [1915] 1 K.B. 857; and, if it were not so, I would find it difficult to understand how the clause could be applicable to a question of naturalisation.

In regard to the second, what difference can the character of the naturalisation proceedings make? If the law disable an alien

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enemy from becoming naturalised, can it be that any Judge is bound, in the face of that disability, to enable him to become naturalised? It is not the Judge who is under disability, it is the alien enemy. The disabilities of aliens are not confined to those imposed in proceedings in the Courts; there is, for instance, the disability, even in an alien friend, to hold public office; and in whatsoever they may occur they must be given effect.

And as to the last point, can there be any doubt that the Judge's duties are judicial, not merely ministerial? If any proof of their judicial character were needed, the learned and comprehensive judicial opinion expressed by the learned Judge would afford it; he has not acted as if his duties were purely ministerial. The fact that the Judge cannot *ex mero motu* enter into the merits of an application, that there must be "opposition" and "objection," something in the nature of an appeal against the certificate of the magistrate, notary or other officer, who deals with the case in the first instance, does not make the duties which the Judge has to perform any the less judicial; that is indeed generally so in regard to all appellate tribunals—there can be no judicial inquiry into any matters which have not been duly appealed against.

The subject must not be treated as if it were, and were merely, the question whether an alien enemy would be disabled from seeking redress in the civil courts, redress of the character there commonly awarded. The question is a very different one. It is whether the Act in question enables an alien enemy to become naturalised in Canada: the onus of shewing that it does rests upon him; and, if he satisfy that onus, common law disabilities cannot stand in his way: but, if he do not, nothing else can help him; and I may add, parenthetically, that if a convention, between nations, for mutual naturalisation, were confirmed by Act of Parliament, it could hardly be construed as applicable in time of war between the contracting nations. The King's license, or a proclamation tantamount to it, may relieve from the disabilty to sue; but, as I have said, nothing short of an Act of Parliament can confer any right to naturalisation. Therefore, I am, with much respect, bound to differ entirely from Archambault, J., in the opinion expressed by him; and,

agreeing with the contrary opinions I have mentioned, to consider that the Act in question is not applicable to an alien enemy.

If the Act could be said to be only ambiguous in that respect, driving one to a consideration of the purposes for which, and the circumstances under which, it was passed, the conclusion would be the same.

Grave reasons at once suggest themselves to the mind why such an enactment should not be applicable to an alien enemy, especially in these days when the power of some great armies is so mightily increased by the ramifications of vast numbers of spies throughout the length and breadth, and in all the corners, of the enemy country; an army of spies constituting largely the eyes, ears, and intelligence of the fighting army. With present battlefields so far away from Canada, the vital importance of every kind of protection against such a system of spying may not be fully appreciated by all of us as it should be; but, if we remember that some day the battlefields may be at or within our gates, that importance cannot but be more apparent. So, too, as I have already intimated, fairness in one part of the Empire to all other parts, demands, at least, great care in admitting any alien enemy to the status of a British subject. If the methods provided in the Act in question be applicable to such an alien, then, indeed, the least, if any, care has been taken.

On the contrary, nothing of a grave character has been, or can be, suggested. If the application for naturalisation be made in good faith, what harm can come in letting it remain in abeyance during the war? It is said that under the Dominion Lands Act no alien can obtain title to land acquired under its provisions. But assuredly, if that be a matter of consequence, the proper remedy lies in providing for discriminate grants to aliens, rather than in the indiscriminate naturalisation of alien enemies in order that a few persons may be able to complete their titles to lands to be granted by the Crown to them.

So that, whatever road may be taken, at the journey's end is a door closed against alien enemies; a closed door with the words "enemies excluded" written plainly above it.

There are yet, however, a few more things to be said in order

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that it may plainly appear that I have not overlooked anything that has been suggested, or that I can imagine, in favour of these applications.

It is said, and it is no doubt a fact, that the Secretary of State for Great Britain and Ireland has, in the present year, granted certificates of naturalisation to a number of persons who are described as Austrians, Germans, and Turks, under the present naturalisation laws of that United Kingdom, of which the Canadian Naturalisation Act of 1914 is an echo. But that fact helps these applicants little, if at all, because it may be that such persons, when so naturalised, had been, in accordance with the laws of the land of their natal allegiance, expatriated or otherwise relieved from such allegiance. It is not to be presumed that any Minister of the Crown would be a party to an act, and would make the United Kingdom a party to an act, which would be, in the other party to it, an act of treason for which he or she rightly might be hanged or shot; and of course the fact—if it be a fact—that the Secretary of State is of opinion that he has power to grant naturalisation to an alien enemy, would not confer the power; whether he has or not can be determined only by the proper Courts, including the High Court of Parliament; and, besides all that, the enactment under which such naturalisation took place is so widely different from the Act in question in these applications, that a binding decision in favour of the power under the former, could, in no sense, be considered a decision in favour of the right of an alien enemy to naturalisation under the latter.

A Canadian order in council and proclamation, of the 28th October, 1914, makes it plain that, at that time, the Governor-General in council deemed that an alien enemy might be naturalised in Canada. The last paragraph of the proclamation makes it plain. But, again, all that has little, if any, effect upon the question under consideration, for the like reasons as those expressed as to the action of the Imperial Secretary of State. To the Courts, not to the Governor-General in Council, belongs the interpretation of the law; an assumption that an alien enemy is entitled to be naturalised in Canada may, or may not, be right in regard to the naturalisation enactment of 1914. I

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hold that it cannot be right only in regard to the earlier enactment. Whether the Governor in Council has, or has not, power to curtail the right to naturalisation in Canada, by virtue of the War Measures Act, it is quite plain that there is no such power to extend it.

If the subject be considered of sufficient importance to be taken before a court of appeal, either to the Supreme Court of Canada under the provisions of sec. 60 of the Act governing that Court, or to the Appellate Division of the Supreme Court of Ontario, I shall do everything in my power to facilitate any such appeal; and, for that purpose, Mr. Secord's contention, at the assizes, may be treated as also a refused application to me, as a Judge of the Supreme Court of Ontario, for a mandamus to compel me, as *persona designata* under the 19th section of the Act in question, to make the direction provided for in that section so that the naturalisation of these applicants may be carried on to completion, with leave, for what it may be worth, to appeal in any possible way, though I fear that none of these things can aid very much, if at all, in getting the matter before any Court of this Province.

If no such steps, or any other for the same purpose, be taken within thirty days, no direction, such as the 19th section of the Act provides for, will be made, and so the applicants must fail in their present efforts to become naturalised in Canada; but, if any such steps be taken, the applications will be held in abeyance, for a reasonable length of time, to obtain the opinion of some court of appeal upon the subject, which, if favourable to the applicants, can then be given effect to by me.

*Application refused.*

**Annotation—Aliens—Alien enemies—Their status during war.**

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A declaration of war by a foreign country against a foreign power imports a prohibition of commercial intercourse with the subjects of that power: *Barrick* v. *Buba*, 2 C.B (N.S.) 563.

The national character of a trader is to be decided, for the purposes of the trade, by the national character of the place in which it is carried on. If a war breaks out, a foreign merchant carrying on trade in a belligerent country has a reasonable time allowed him for transferring himself and his property to another country. If he does not avail himself of the opportunity, he is to be treated, for the purposes of trade, as a subject of

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the power under whose dominion he carries it on, and as an enemy of those with whom that power is at war: *The Gerasimo*, 11 Moore P.C. 88.

Trading with an enemy without the King's license is illegal; and it is illegal for a subject in time of war, without the King's license, to bring even in a neutral ship goods from an enemy's port, which were purchased by his agents resident in the enemy's country, after the commencement of hostilities, although it may not appear that they were purchased from an enemy: *Potts* v. *Bell*, 2 Esp. 612.

Merchants, subjects of neutral states, resident in the territories of an ally, are, for the purposes of war, considered as domiciled in the territories of an ally, and prohibited from trade with a belligerent: *The San Spiridione*, 2 Jur. (n.s.) 1238.

Commerce by a person resident in an enemy's country, even as a representative of the Crown of this country, is illegal and the subject of prize, however beneficial to this country, unless authorized by license: *Ex p. Baglehole*, 18 Ves. 528; *McConnell* v. *Hector*, 3 Bos. & P. 113.

The character of an alien and a British subject cannot be united in one person: *Reg.* v. *Manning*, 2 Car. & K. 887.

The common law rule strictly limiting an alien enemy in his civil rights is now modified in his favour when he resides in this country by a license or under protection of the Crown: *Topay* v. *Crows Nest Pass Coal Co.*, 18 D.L.R. 784.

PROOF OF ALIENAGE.—To prove that a person was an alien enemy at the time of the action, it is not enough to shew that he was some time before domiciled in a territory which has become hostile, without shewing that he was a native of that territory: *Harman* v. *Kingston*, 3 Camp. 152.

The mere production of a passport found on a prisoner, which is proved to be granted by the authorities of a foreign state to natural-born subjects only, is not evidence of his being an alien: *Reg.* v. *Burke*, 11 Cox C.C. 138.

To prove a replication of license to a plea of alien enemy, it is not enough to prove that a license was granted to the plaintiff with an allowance to undertake a voyage, which did not terminate until the commencement of hostilities, and that after the termination of the voyage he was at large here without molestation: *Boulton* v. *Dobree*, 2 Camp. 163.

HOSTILE NEUTRALS.—A neutral residing in an enemy's country, as consul of a neutral state, and who also trades there as a merchant, is to be regarded as an enemy: *Sorensen* v. *Reg.*, 11 Moore P.C. 141.

An alien carrying on trade in an enemy's country, though resident there also in the character of consul of a neutral state, is considered an alien enemy, and as such disabled to sue, and liable to confiscation: *Albretcht* v. *Sussman*, 2 Ves. & B. 323.

A native of a neutral state taken in an act of hostility on board of an enemy's ship, and brought to England as a prisoner of war, is not disabled from suing, while in confinement, on a contract entered into as a prisoner of war: *Sparenburgh* v. *Bannatyne*, 1 Bos. & P. 163.

An action may be maintained by a person of an enemy nationality who is neither residing nor carrying on business in an enemy country, but is residing either in an allied or a neutral country and is carrying on business through his partners in that allied country: *Re Mary Duches, etc.*, 31 T.L.R. 248.

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TEMPORARY OCCUPATION.—A temporary occupation of a territory by an enemy's force does not, of itself, necessarily convert the territory so occupied into hostile territory or its inhabitants into enemies: *The Gerasimo*, 11 Moore P.C. 88.

In the case of *Société Anonyme Belge, etc.*, v. *Anglo-Belgian Agency*, 31 T.L.R. 624, the plaintiffs were a company incorporated under the laws of Belgium. Their registered office was in Antwerp. Soon after the outbreak of the war, the business of Antwerp was closed and the books were removed to London. The larger part of Belgium, including Antwerp, was in the effective military occupation of Germany. The business of the plaintiff company had since been wholly carried on in London. The company had mines in Portugal, and the whole of the output was being sold in England or in France. It was held, that the plaintiff company was not an enemy within the meaning of any of the Acts or Proclamations relating to trading with the enemy.

CONTRACTS.—A contract with an alien enemy made in time of war cannot be enforced in the Courts here: *Willison* v. *Pattison*, 7 Taunt. 439.

If an alien enemy, a prisoner of war, makes a contract, it may be enforced by the King for the benefit of the Crown. And if the Crown does not enforce it, the prisoner may sue on it after the return of peace: *Maria* v. *Hall*, 1 Taunt. 33n.

The fact that a party to a contract becomes an alien enemy on the outbreak of the war does not necessarily have the effect of abrogating the contract, but will merely suspend all obligations thereunder during its continuance: *Zinc Corporation* v. *Skipworth* (No. 1), 31 T.L.R. 106. But, in allowing an appeal from this judgment in 31 T.L.R. 107, it was said, that an action by one party to a contract for a declaration as to its construction will not lie in the absence of the other party, where there is no third party whose interests make it necessary to determine its construction.

A c.i.f. contract for the sale of hides entered into between the subjects of an allied state with the subjects of a state afterwards at war with the allied states becomes illegal on the outbreak of the war, and is rendered incapable of breach for which no recovery can be had: *Kreglinger & Co.* v. *Cohen, etc.*, 31 T.L.R. 592.

During the war of England with the United States in 1812, a native of America made several consignments to a British subject in England, who would dispose of them in France and afterwards remit the proceeds. In an action by the American against the assignee in bankruptcy of the estate of the British subject, it was held, that he could only prove as a creditor for the cargoes shipped after the signing of the peace preliminaries at Ghent, but not for the cargoes that arrived during the war: *Ogden* v. *Peele*, 8 D. & R. 1.

BILLS AND NOTES.—An action may be maintained here by a neutral on promissory notes given to him by a British subject in an enemy's country for goods sold there: *Houriet* v. *Morris*, 3 Camp. 303.

Though a bill drawn by a prisoner of war in France upon a person resident in England in favour of an alien enemy could not have been originally enforced, the drawer is liable on a subsequent promise in time of peace: *Duhammel* v. *Pickering*, 2 Stark. 90.

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It is no defence to an action to a bill of exchange that the plaintiff sues in trust for an alien enemy: *Daubuz* v. *Morshead*, 6 Taunt. 332.

An alien, to whom a bill, drawn on England by a British subject detained prisoner in France during war with England, payable to another British subject also detained there, is indorsed by the latter, he may sue on it in this country after the return of peace: *Antoine* v. *Morshead*, 6 Taunt. 237.

PARTNERSHIPS.—Where a partnership contract is no longer possible of being carried out according to its terms by reason of war, as where a license to trade as partners on the terms that no payments should be made to or for alien enemies, while some of the very partners are alien enemies, the Court will make an order *ex parte* for the appointment of a receiver and manager of the business carried on by the partnership: *Armitage* v. *Borgman*, [1915] W.N. 21, 59 S.J. 219.

In an action on a bill of exchange and for goods supplied before the war by a firm, of which one of the partners was an alien enemy, but which partnership was dissolved by mutual consent at the outbreak of the war, does not preclude the British partner from recovering thereon by reason of secs. 6 and 7 of the Trading with the Enemy Act: *Wilson* v. *Ragosine & Co.*, 31 T.L.R. 264.

An action is maintainable by a receiver of a partnership of whom one of the partners is an alien enemy residing in the enemy country, to recover the price of goods sold by the partnership: *Rombach* v. *Gent*, 31 T.L.R. 492.

CORPORATIONS AND COMPANIES.—A limited company registered in this country according to English law is not prevented from suing by the fact that almost all the shares are held by alien enemies: *Amorduct Mfg. Co.* v. *Defries*, 31 T.L.R. 69.

A company which is registered in England, and carries on business there, but in which the majority of the shares are held by alien enemies, is entitled to sue for the price of goods sold and delivered, if it is not employed to sell the goods as the agent of an alien enemy with the object of remitting the money abroad, inasmuch as the right of such company to trade in England and the right of British subjects to trade with it in England are recognized by the Trading with the Enemy Act, 1914, and the Proclamations issued thereunder: *Continental Tyre, etc.*, v. *Tilling Ltd.*, 31 T.L.R. 77.

Where an action for the infringement of patent, registered in the joint names of an English and an enemy company, is brought nominally in the names of both companies, but in whom the sole right of prosecuting proceedings for the infringement is in the British company, the Court will not entertain an objection to the proceedings because one of the companies is an alien enemy, since to deny the British company the right to prosecute the action would be to deny to a British subject the right to bring an action for his own protection: *Mercedes Daimler Motor Co. et al.* v. *Maudslay Motor Co.*, [1915] W.N. 54, 31 T.L.R. 178.

An officer of an enemy manufacturing company in charge of a manager who had authority to enter into contracts, and to sue and be sued on behalf of the company, is not a "branch" in the sense of sec. 6 of the Trading with the Enemy Proclamation, and that the payment of money after the date of the proclamation, in fulfilment of a previous contract, is not a "transaction," in the sense of that section, so as to be within the exception of transactions by or with the enemy having a branch situated in British territory: *Orenstein, etc.*, v. *Egyptian Phosphate Co.*, [1915] S.C. 55.

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BANKS.—In an action by an enemy banking company on a bill it was pleaded that the plaintiffs were alien enemies, and that their license under the Aliens Restriction Act, 1914, did not authorize their London branch to present and receive payment of the bill. It was held, that the transactions permitted by the license were not limited to transactions with the London branch, and that the transaction would in the ordinary course have been carried out in London; nor was the presentment or collection a new transaction, and that they were, therefore, entitled to recover: *Direction Der Disconto-Gesselllschaft* v. *Brandt & Co.*, 31 T.L.R. 586.

The Court will not make a vesting order under sec. 4 of the Trading with the Enemy Act of a disputed balance of an enemy bank in an English bank, since that would be placing the custodian in the position of an assignee of a disputed debt: *Re Bank für Handel, etc.*, [1915] W.N. 145.

INSURANCE.—By a Proclamation issued with statutory authority it was declared that, where an enemy had in Britain a branch carrying on insurance business, transactions with the branch should be considered as transactions with the enemy. It was held that the Proclamation was not retrospective, and that, in any case, an action against the enemy insurance company to recover a loss was not a transaction within the meaning of the Proclamation, and that the right of suit in respect of the obligation to pay the loss was not suspended by reason of the war: *Ingle* v. *Mannheim Continental Ins. Co.*, [1915] 1 K.B. 227, 31 T.L.R. 41.

Policies of life insurance pledged with an alien enemy as security for bills cannot be recovered by the trustee in bankruptcy as the custodian under sec. 4 (1) of the Trading with the Enemy Act, 1914, where the alien enemy is beyond the jurisdiction of the Court, and no assignment of the policies had been executed in favour of the enemy; that it is not the object of the Act that the custodian should be used as a medium for recovering for the trustee the bankrupt's property which during the war he could not recover for himself: *Re Reuben*, 31 T.L.R. 562.

RECEIVERS AND TRUSTEES.—The Court will appoint a receiver of a partnership business, of which one of the owners is an alien enemy, if the business is an ordinary commercial enterprise, and not within sec. 3 of the Trading with the Enemy Act, 1914: *Rombach* v. *Rombach*, 59 S.J. 90.

An application for the appointment of a controller of an enemy firm or company under sec. 3 of the Trading with the Enemy Act, 1914, may be made by an originating motion. A controller so appointed may be ordered to furnish the usual security required from a receiver and to account for, and report on, periodically, as to the position of the business and the results of carrying it on: *Re Meister Lucius, etc.*, 59 S.J. 25, 31 T.L.R. 28.

In the case of *Re Bechstein* (No. 1), 58 S.J. 863, a large firm, composed of alien enemies, had a London branch employing a large number of British workmen. The Court appointed the British assistant-manager of that branch to be receiver and manager upon his undertaking (1) not to remit goods or money forming assets of the defendant's business to any hostile country; (2) to endeavour to obtain from the Crown a license to trade.

Under the rules promulgated under the Trading with the Enemy Act, 1914, for the purpose of obtaining an order vesting in the Public Trustee all the property of an enemy company having a branch in England, an originating summons must be issued in pursuance of the rules, and the

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matter come on first in Chambers, and where the alien enemy is interned in an internment camp, a letter should be sent to him enclosing a copy of the originating summons: *Re Company*, 59 S.J. 217.

PRINCIPAL AND AGENT.—A British subject, acting as an agent for an undisclosed principal who is an alien enemy, is not debarred at common law, apart from the Trading with the Enemy Act, 1914, and the Proclamations issued thereunder, from maintaining an action against British subjects for the price of goods; and, upon his consenting to a stay of execution until a hearing under the Trading with the Enemy Amendment Act, 1914, for the vesting of the moneys in the custodian thereunder, he will be entitled to judgment: *Schmidt* v. *Van Der Veen*, 31 T.L.R. 214.

The agent of a principal who is an alien enemy is not entitled to bring an action against him for a declaration that the agent be entitled to collect debts due the principal, and to pay debts due from the latter, or for the appointment of a receiver of the assets of the principal's business in this country: *Maxwell* v. *Grunhut*, 31 T.L.R. 79, 59 S.J. 104.

In following the case of *Maxwell* v. *Grunhut*, *supra*, it was held that a British manager of an enemy firm with a branch in London, who was remunerated by a salary and commissions on sales, is not a person interested within the purview of the Trading with the Enemy Act, 1914, for the purpose of applying for a receiver to conduct the affairs of the enemy firm: *Re Gaudig & Blum*, [1915] W.N. 34, 31 T.L.R. 153.

MARRIED WOMEN.—In the case of *De Wahl* v. *Braune*, 1 H. & N. 178, it was held that a *femme covert* could not sue alone on a contract made with her before or after marriage, though her husband was an alien enemy.

But in *Thurn & Taxis* v. *Moffitt*, [1915] 1 Ch. 58, 31 T.L.R. 24, it was held that a woman who is an alien enemy and who claims to be the wife of an alien enemy, and who has registered herself as an alien subject of an enemy state under the Aliens Restriction Act, 1914, is entitled, notwithstanding the state of war existing between this country and her own, to sue in the Courts of this country for the purpose of enforcing an individual right not claimed through her husband.

EXECUTORS AND ADMINISTRATORS.—In *Re Estate of Herman Koenig*, [1915] W. N. 24, the executor, the next-of-kin and chief beneficiaries were alien enemies residing in the enemy country, and on a power of attorney by the executor to a British subject an order was made granting letters of administration with the will annexed. But in *Re Estate of Jacob Schiff*, 59 S.J. 303, it was held, not following the *Koenig case*, *supra*, that where the next-of-kin of a deceased intestate are alien enemies, the Public Trustee is the proper person to take the grant of administration to the estate of the deceased.

Distinguishing the case of *Continental Tyre, etc.*, v. *Daimler Co.*, [1915] 1 K.B. 893, and following *Dumenko* v. *Swift Can. Co.*, 32 O.L.R. 87, it was held that an action under the Fatal Accidents Act, R.S.O. 1914, ch. 151, brought by an administrator of the estate of a deceased person, cannot be maintained if brought for the benefit of alien enemies, and that if such action is brought after the commencement of the war, it will be dismissed: *Dangler* v. *Hollinger, etc.*, 23 D.L.R. 384, 34 O.L.R. 78.

ACTIONS.—No action can be maintained either by or in favour of an alien enemy: *Brandon* v. *Nesbitt*, 6 Term. Rep. 23.

**Annotation** *(continued)*—**Aliens—Alien enemies—Their status during war.** **ONT.**

**Annotation**

Alien enemies.

War does not suspend an action against an alien enemy, and he may appear and defend either personally or by counsel: *Robinson & Co.* v. *Mannheim Continental Ins. Co.*, [1915] 1 K.B. 155, 31 T.L.R. 20.

One is an alien enemy of this country whose sovereign is at enmity with the Crown of England, and one of his disabilities is that he cannot sue in our Courts during war, unless he is here "in protection," the burden of shewing such status being on himself. Therefore, a citizen of a nation at war with this country who institutes a civil action will have his action stayed, unless as a condition precedent to such right he establishes that he is "in protection" in such sense that he is not a person professing himself hostile to this country nor in a state of war against it: *Bassi* v. *Sullivan*, 18 D.L.R. 452, 32 O.L.R. 14.

Thus it was held, that an alien enemy cannot, by the municipal law of this country, sue for the recovery of a right claimed to be acquired by him in actual war: *Anthon* v. *Fisher*, 2 Doug. 649n.

In *Ricord* v. *Bettenham*, 3 Burr. 1734, 1 W.Bl. 563, it was held, that an action was maintainable by an alien enemy upon a ransom bill, even when the hostage given died in prison.

In *Maria* v. *Hall*, 1 Taunt. 32, the right of action of a prisoner of war for work and labour carried on under the protection of the commander of the British forces was upheld.

Following the case of *Topay* v. *Crows Nest, etc.*, 18 D.L.R. 784, but disapproving *Bassi* v. *Sullivan*, 18 D.L.R. 452, it was held, that a person of German or Austro-Hungarian nationality, domiciled in Canada, as to whom there is no reasonable ground for believing that he is engaged in hostile acts or in contravening the law, may, by virtue of the Orders-in-Council (Can.) of August 7 and 15, 1914, maintain an action for negligence against his employer for personal injuries sustained in following his avocation where such action would lie were his country not at war with Great Britain; and that the onus is not upon the alien to prove, on the defendant's motion to stay proceedings in an action brought before war was declared, that he had not contravened the restrictions specified in the Royal Proclamations: *Pescovitch* v. *Western Can. Flour*, 18 D.L.R. 786, 24 Man. L.R. 783.

As to right of subject of nation at war with Great Britain to bring an action for damages, see *Oskey* v. *City of Kingston*, 20 D.L.R. 959, 31 O.L.R. 190. It was there held, that a workman's widow and children, although of a nation with which Great Britain is at war, so long as they reside in the province and do not contravene the regulations contained in the Proclamations, are entitled, notwithstanding their status as alien enemies, to proceed with their action instituted before the declaration of war, seeking to recover damages under Lord Campbell's Act.

In *Dame Mathilda Johansdotter* v. *C.P.R. Co.*, 47 Que. S.C. 76, it was held, that the absence of a dependant or beneficiary in a foreign country is a justification for not filing a claim within the delay fixed by the Workmen's Compensation Act.

The plaintiffs, subjects of Austria and residing in that country, began their action before the outbreak of war with Great Britain and were ordered to give security for costs. Their solicitor, not being able to communicate with them after the war began, and no further proceedings having been

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Alien enemies.

**Annotation *(continued)*—Aliens—Alien enemies—Their status during war.**

taken, applied for an extension of time and for a stay of proceedings, in order to avoid the dismissal of the action which follows upon failure to give security, and which was refused. It was held, following *Brandon* v. *Nesbitt*, 6 T.R. 23, and *Le Bret* v. *Papillon*, 4 East 502, that the plaintiffs having become alien enemies, are barred from further proceedings, and the action must be dismissed, but that the dismissal will not be a bar to a subsequent action after the termination of the war: *Dumenko* v. *Swift Can. Co.*, 32 O.L.R. 87.

APPEALS.—An alien enemy, unless with special license or authorization of the Crown, has no right to sue during the war, his right being suspended during the progress of hostilities and until after the restoration of peace. He may, however, be sued during the war in the King's Courts, and he may appear to be heard in his defence. He has the same right of appeal as any other defendant, but, if he be a plaintiff, his right of appeal is suspended until after the restoration of peace: *Porter* v. *Freudenberg*, C.A., [1915] W.N. 43, 31 T.L.R. 162.

In an appeal by an alien enemy, who was the registered owner of a patent, from an order for the revocation of the patent, it was held, that the appellant must be regarded as in the same position as a defendant who appeals from a judgment given against him, and that, accordingly, the appellants were entitled to appear and to be heard on the motion and to have the appeal heard in the ordinary course, and that the hearing of the appeal should not be suspended during the war: *Re Merten's Patent*, [1915] W.N. 43, 32 R.P.C. 109.

An appeal in an action for the infringement of patent prosecuted by a domestic company and an enemy corporation of whom the patent had been claimed by assignment, the Court will not strike out the enemy corporation as co-plaintiff where the action could not otherwise be proceeded with separately, particularly where there is no request to that effect by the co-plaintiff, but will suspend the proceedings until after the termination of the war: *Actien-Gesellschaft, etc.*, v. *Lewinstein, Ltd.* (1915), 50 L.J. 105, 31 T.L.R. 225.

PLEADING.—In a plea of alienage, the defendant must state that the plaintiff was born in a foreign country, at enmity with this country, and that he came here without letters of safe conduct from the King: *Casseres* v. *Bell*, 8 Term. Rep. 166.

A plea that the plaintiff was an alien enemy residing in the country without the license, safe conduct, or permission of the Sovereign is good, although it does not expressly negative a certificate of the Secretaries of State under 7 & 8 Vict. ch. 66, ss. 6, 8: *Alcenius* v. *Nygren*, 4 El. & Bl. 217.

A British agent effecting a policy on behalf of alien enemies, who became such after the happening of the loss but before the commencement of the action, is entitled to recover against the underwriter, who had only pleaded the general issue; for such temporary suspension during the war of the assured's right of suit upon a contract, legal at the time, and liable to be enforced upon the return of peace, cannot be taken advantage of under a plea of perpetual bar, there being no legal disability on the plaintiff on the record to sue: *Flindt* v. *Waters*, 15 East 260.

In an action on a policy of insurance, it is no defence under the general issue that the persons interested, who were neutrals when the policy was

**Annotation *(continued)*—Aliens—Alien enemies—Their status during war.** ONT.

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effected and the loss happened, had become alien enemies before the action: *Harman* v. *Kingston*, 3 Camp. 152.

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A plea of alienage to an action on a policy, brought in the name of an English agent for his alien principal, whose interest appears on the record, is a good plea; and a replication to such plea, that the alien is indebted to the agent in more money than the value of the property insured, cannot be supported: *Brandon* v. *Nesbitt*, 6 Term. Rep. 23.

When an alien enemy, at the time of the action brought, became an alien enemy after the plea pleaded, a plea of the defendant that the plaintiff ought not to have or maintain his action because he was before, at the time of exhibiting the bill, and that he now is, an alien enemy, is badly pleaded. But, notwithstanding the imperfection, the Court, if satisfied from the whole record that the plaintiff is in point of fact an alien enemy, it will give judgment accordingly: *LeBret* v. *Papillon*, 4 East. 502.

COSTS.—If the plaintiff is domiciled in a country in a state of war with England, he cannot, so long as that state of war lasts, be required to furnish security; but the Court must suspend all proceedings in the case until peace is restored: *Re Rozarijouk* v. *B. & A. Asbestos Co.*, 16 Que. P.R. 213.

It was questioned, in the case of *Robinson & Co.* v. *Mannheim Continental Ins. Co.*, [1915] 1 K.B. 155, 31 T.L.R. 20, whether, if an alien enemy is successful, he is entitled to an order for the payment of costs. In the judgment, Bailhache, J., remarked: "I mention this point now because, in considering my judgment, it occurred to me as a possible difficulty in the way of allowing the action to proceed. I think, however, the difficulty, if it arises, is sufficiently met by suspending the defendant's right to issue execution."

ARBITRATION.—In the case of *Smith, etc.*, v. *Becker, etc.*, 31 T.L.R. 59, the right of an alien enemy to proceed with an arbitration under the arbitration clauses in a contract made before the outbreak of the war was upheld.

NATURALIZATION.—According to the principles of public international law recognized in England in time of war, the subjects are enemies as are the states, "*jus standi in judicio*"; but if the subjects of a belligerent state are allowed to remain in this country, they are relieved from their disabilities. The proclamation of August 15, 1914, which confirmed to the Germans and Austro-Hungarians residing in Canada the enjoyment of all rights which the law had accorded them in the past, upon condition of their good conduct, is in conformity with art. 23*b* of the Hague Conference, and, consequently, such aliens who live in this country during the war preserve their civil rights, and particularly that of applying for naturalization: *Re Herzfeld*, 46 Que. S.C. 281.

The *Herzfeld* case, *supra*, was not followed in *Re Cimonian*, 23 D.L.R. *ante*, 34 O.L.R. 129, and it was held, following *King* v. *Lynch*, [1903] 1 K.B. 444, and *Porter* v. *Freudenberg*, [1915] 1 K.B. 857, that an alien enemy has no right to naturalization, and his application therefor will be dismissed by the Court of its own initiative.

ARREST AND DETENTION.—In performing the duty of arresting and detaining persons of a nationality at war with Great Britain who attempt to

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Alien enemies.

**Annotation** *(continued)*—**Aliens—Alien enemies—Their status during war.**

leave Canada, and in regard to whom there is reasonable ground to believe that their attempted departure is with a view of assisting the enemy, a wide discretion is left to the military commanding officers, which will not ordinarily be reviewed or interfered with by the Courts under a *habeas corpus* process: *Re Chamryk*, 19 D.L.R. 236, 25 Man. L.R. 50.

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## DANGLER v. HOLLINGER GOLD MINES.

*Ontario Supreme Court, Sutherland, J. May 1, 1915.*

1. ALIENS (§ III—19)—ACTION BY ADMINISTRATOR UNDER FATAL ACCIDENTS ACT—BENEFIT OF ALIEN ENEMIES.

An action under the Fatal Accidents Act, R.S.O. 1914, ch. 151, brought by the administrator of the estate of a deceased person, cannot be maintained if brought for the benefit of alien enemies of the King.

[*Continental Tyre and Rubber Co. v. Daimler Co.*, [1915] 1 K.B. 893, considered and distinguished; *Dumenko v. Swift Canadian Co.* (1914) 32 O.L.R. 87, applied and followed.]

Statement

APPLICATION for an order dismissing the action.

*G. H. Sedgewick*, for the defendants.

*H. S. White*, for the plaintiff.

Sutherland, J.

SUTHERLAND, J.:—This is an application for an order dismissing the action, on the ground that the persons for whose benefit it is brought are alien enemies of His Majesty the King.

On April 28, 1914, one Steve Samurski was crushed in a shaft of the defendant company, and so badly injured that his death resulted. The plaintiff is the administrator of his estate, duly appointed by a Surrogate Court of this Province.

The action is brought under R.S.O. 1914, ch. 151, the Fatal Accidents Act. By sec. 4, sub-sec. (1), "every such action shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused," etc. The Act also provides (sec. 6) that every action shall be commenced within twelve months after the death of the deceased, and that (sec. 7) the plaintiff in his statement of claim shall set forth full particulars of the persons for whom and on whose behalf the action is brought. By sec. 8, it further provides that, "if there is no executor or administrator of the deceased, or there being such executor or administrator, no such action is, within six months after the death of the deceased, brought by such executor or administrator, such action may be brought by all or any of the

persons for whose benefit the action would have been if it had been brought by such executor or administrator."

In paragraph 3 of the statement of claim, the plaintiff alleges that he "brings this action as administrator of the estate of the said Steve Samurski and for the benefit of John Samurski and Agnes Samurski, the father and mother respectively of the said Steve Samurski, deceased, and being persons dependent upon the said Steve Samurski for maintenance and support."

The defendant company, by para. 12 of their statement of defence, plead that "John Samurski and Agnes Samurski, for whose benefit the plaintiff alleges this action is brought, are subjects of the Emperor of Germany and reside within the limits of the German Empire and are alien enemies of His Majesty the King, and the plaintiff says that on these grounds this action should be dismissed."

It was on the argument admitted on behalf of the plaintiff that the father and mother of the deceased man are subjects of the Emperor of Germany and reside in Germany.

By Imperial Act 4 & 5 Geo. V. ch. 87, intituled "An Act to make provision with respect to penalties for Trading with the Enemy, and other purposes connected therewith," it is enacted, sec. 1 (2): "For the purposes of this Act a person shall be deemed to have traded with the enemy if he has entered into any transaction or done any act which was, at the time of such transaction or act, prohibited by or under any proclamation issued by His Majesty dealing with trading with the enemy for the time being in force, or which at common law or by statute constitutes an offence of trading with the enemy."

On the 9th September, 1914, a proclamation relating to trading with the enemy was issued, and para. 5 thereof is to the following effect: "From and after the date of this Proclamation the following prohibitions shall have effect (save so far as licenses may be issued as hereinafter provided), and We do hereby accordingly warn all persons resident, carrying on business or being in Our Dominions—(1) Not to pay any sum of money to or for the benefit of an enemy."

This action is for the benefit of the father and mother of the deceased, who are undoubtedly alien enemies.

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In *Dumenko* v. *Swift Canadian Co. Limited* (1914), 32 O.L.R. 87, it was held by Sir Glenholme Falconbridge, C.J.K.B., in an action commenced before war was declared, that the plaintiffs, who were Austrians and entitled to bring the action during peace, became disentitled after a declaration of war in consequence of which they became alien enemies. On the defendants obtaining a præcipe order for security for costs, and the Master making an order extending the time for the giving of the security, and further ordering that in default the action should be dismissed, the plaintiffs moved in Chambers "for an order staying all proceedings . . . so long as may be ordered by the Court or for such further and other order as to the said Court may seem meet and just." The defendants thereupon gave notice that on the return of the motion they would move that the action be dismissed, on the ground that the plaintiffs were alien enemies. It was held: "As to the defendants' motion, it is quite clear upon the authorities that the plaintiffs, having become alien enemies, ought to be barred from further having and maintaining this action. See *LeBret* v. *Papillon* (1804), 4 East 502; *Brandon* v. *Nesbitt* (1794), 6 T.R. 23; Mews' Digest, vol. 8, pp. 210, 211. The plaintiffs' action is, therefore, on this ground also, dismissed with costs. This dismissal is not necessarily—and I do not mean it to be—a bar to a subsequent action in respect of the same matter after peace shall have been declared: Holmested & Langton's Judicature Act, 3rd ed., p. 636."

I was referred by counsel for the applicant to the following cases: *Porter* v. *Freundenberg, Kreglinger* v. *Samuel and Rosenfeld, In re Merten's Patent* (1915), 31 Times L.R. 162.* In the first of these cases there is a general discussion as to the rights of alien enemies in British Courts, and the Attorney-General, who appeared for the Crown, makes an elaborate argument and citation of authorities. At p. 166 the Lord Chief Justice, reading the considered judgment of the Court in the three cases, deals with the question of the meaning of the term "alien enemy," when used in reference to civil rights and liabilities, and says: "Alien enemies have no civil rights or privileges, un-

*[1915] 1 K.B. 857.

less they are here under the protection and by permission of the Crown (Blackstone's Commentaries, 21st ed., vol. 1, ch. 10, p. 373)." And further at p. 167: "Whenever the capacity of an alien enemy to sue or proceed in our Courts has come for consideration the authorities agree that he cannot enforce his civil rights and cannot sue or proceed in the civil Courts of the realm."

The case of *Maxwell* v. *Grunhut* (1914), 31 Times L.R. 79, is a somewhat curious one, and determines that an agent in England "of a principal, who is an alien enemy, is not entitled to bring an action against him for a declaration that the agent is entitled to collect debts due to the principal and to pay debts due from the principal, or for the appointment of a receiver of the assets of the principal's business in this country." At p. 80, the Lord Chief Justice said, with reference to the action, that "it was quite impossible to sustain it, and it was obvious that the agent could have no greater right than his principal who, being an alien enemy, could not sue. In his judgment the claim put forward must be barred; the difficulties in the way were insuperable. He thought that Mr. Justice Scrutton was quite right in refusing to appoint a receiver, and in saying that he had no jurisdiction. The plaintiff's application therefore would not lie, and must be dismissed."

Counsel for the plaintiff in opposing the motion relied on the case of *Continental Tyre and Rubber Co. (Great Britain) Limited* v. *Daimler Co. Limited*, [1915] 1 K.B. 893. The plaintiff company was incorporated in England and carried on business at their registered offices in London. The company were suing on bills accepted by the defendants for goods supplied before the declaration of war. It was contended on behalf of the defendants that the company "must be regarded as an alien enemy . . . and that as commercial intercourse between persons under the protection of the Crown and persons who are alien enemies is illegal, payment to the plaintiff company must be illegal." It was held "that the company did not change its character of an English company because on the outbreak of war all the shareholders and directors resided in an alien enemy country and became alien enemies; that once a corporation has

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been created in accordance with the requirements of the law it is an English company notwithstanding that all its shareholders may be aliens; that payment of a debt to the plaintiff company was not a payment to the alien enemy shareholders or for their benefit, and that the right of the plaintiff company to recover in an action brought to recover a debt due to them was therefore not affected by the fact that practically the whole of the shares were held by alien enemies." Lord Reading, C.J., says at p. 903: "It cannot be disputed that the plaintiff company is an entity created by statute. It is a company incorporated under the Companies Acts and therefore is a thing brought into existence by virtue of statutory enactment. At the outbreak of war it was carrying on business in the United Kingdom; it had contracted to supply goods, it delivered them, and until the outbreak of the war it was admittedly entitled to receive payment at the due dates. Has the character of the company changed because on the outbreak of war all the shareholders and directors resided in an enemy country and therefore became alien enemies? Admittedly it was an English company before the war. An English company cannot by reason of these facts cease to be an English company. It remains an English company regardless of the residence of its shareholders or directors either before or after the declaration of war. Indeed it was not argued by Mr. Gore-Browne that the company ceased to be an entity created under English law, but it was argued that the law in time of war and in reference to trading with the enemy should sweep aside this technicality,' as the entity was described, and should treat the company not as an English company but as a German company and therefore as an alien enemy. If the creation and existence of the company could be treated as a mere technicality, there would be considerable force in this argument. It is undoubtedly the policy of the law as administered in our Courts of justice to regard substance and to disregard form. Justice should not be hindered by mere technicality, but substance must not be treated as form or swept aside as technicality because that course might appear convenient in a particular case. The fallacy of the appellants' contention lies in the suggestion that the entity created by statute is or can be treated

during the war as a mere form or technicality by reason of the enemy character of its shareholders and directors. A company formed and registered under the Companies Act has a real existence with rights and liabilities as a separate legal entity. It is a different person altogether from the subscribers to the memorandum of the shareholders on the register (*per* Lord Macnaghten in *Salomon* v. *Salomon & Co.*, [1897] A.C. 22, at p. 51). It cannot be technically an English company and substantially a German company except by the use of inaccurate and misleading language. Once it is validly constituted as an English company it is an artificial creation of the Legislature and it retains its existence for all intents and purposes. It is a living thing with a separate existence which cannot be swept aside as a technicality. It is not a mere name or mask or cloak or device to conceal the identity of persons and it is not suggested that the company was formed for any dishonest or fraudulent purpose. It is a legal body clothed with the form prescribed by the Legislature. In determining whether a company is an English or foreign corporation no inquiry is made into the share register for the purpose of ascertaining whether the members of the company are English or foreign. Once a corporation has been created in accordance with the requirements of the law it is an English company notwithstanding that all its shareholders may be foreign. Just as a foreign corporation does not become British and cease to be foreign if all its members are subjects of the British Crown (*per* Lord Macnaghten, Lord Brampton, and Lord Lindley in *Janson* v. *Driefontein Consolidated Mines*, [1902] A.C. 484, at p. 497). For the appellants' contention to succeed, payment to the company must be treated as payment to the shareholders of the company, but a debt due to a company is not a debt due to all or any of its shareholders: *Salomon* v. *Salomon & Co.*, [1897] A.C. 22. The company and the company alone is the creditor entitled to enforce payment of the debt and empowered to give to the debtor a good and valid discharge. Once this conclusion is reached it follows that payment to the plaintiff company is not payment to the alien enemy shareholders or for their benefit."

It is contended on behalf of the plaintiff that the right of

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action is clearly given under the Fatal Accidents Act to an executor or an administrator, and that it is an administrator duly appointed by a competent Surrogate Court of the Province who has brought the action. It is argued that, as a company incorporated in Great Britain, even though its directors and shareholders are alien enemies, has a right to bring an action for the recovery of a debt due the company, even so an administrator, duly appointed by a Surrogate Court of this Province to represent the estate of the deceased person, is legally entitled to bring an action for a claim such as is involved in this action, even though the benefit accrue to alien enemies.

It is also contended that in any event, even if an order were made to stay the action, there should be no order to dismiss it. It is furthermore pointed out that even to stay the action may result in hardship and damage to the plaintiff, inasmuch as in actions of this character, the witnesses being in many cases miners and people who float about from place to place, the evidence necessary to establish a claim may be lost.

If this were an action by the administrator to assert a claim for a debt due the estate of the deceased person, I would be disposed to think there might possibly be some analogy between this case and the *Continental Tyre and Rubber Company* case. But, where the action is brought under an Act by which it is expressly provided that it shall be for the benefit of the parents etc., and such parents are, as here, unquestionably alien enemies, a different view should, I think, be taken, and it should be held that the plaintiff has no right of action.

In *Blake* v. *Midland R.W. Co.* (1852), 18 Q.B. 93, an action by the administratrix of a deceased person under 9 & 10 Vict. ch. 93, it was held that the jury, in estimating damages, could not "take into consideration mental suffering or loss of society, but must give compensation for pecuniary loss only." Coleridge, J., at p. 109, says: "The title of this Act may be some guide to its meaning: and it is 'An Act for compensating the families of persons killed;' not for solacing their wounded feelings. Reliance was placed upon the first section, which states in what cases the newly given action may be maintained although death has ensued; the argument being that the party injured,

if he had recovered, would have been entitled to a solatium, and therefore so shall his representatives on his death. But it will be evident that this Act does not transfer this right of action to his representative, but *gives to the representative* a totally new right of action, on different principles." At p. 110: "The measure of damage is not the loss or suffering of the deceased, but the injury resulting from his death to his family. This language seems more appropriate to a loss of which some estimate may be made than to an indefinite sum, independent of all pecuniary estimate, to soothe the feelings; and the division of the amount strongly leads to the same conclusion: 'And the amount so recovered' 'shall be divided amongst the before mentioned parties in such shares as the jury by their verdict shall find and direct.'"

And in *Pym* v. *Great Northern R.W. Co.* (1863), 4 B. & S. 396, at p. 407, Erle, C.J., says: "The remedy however given by the statute is not given to a *class* but to *individuals*, for by sec. 2 'The jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought.'"

In *Seward* v. *The "Vera Cruz"* (1884), 10 App. Cas. 59, at p. 67, the Earl of Selborne, L.C., says: "Lord Campbell's Act gives a new cause of action clearly, and does not merely remove the operation of the maxim, '*actio personalis moritur cum personâ*,' *because the action is given in substance not to the person representing in point of estate the deceased man*, who would naturally represent him as to all his own rights of action which could survive, but to his wife and children, *no doubt suing in point of form in the name of his executor.*"

See also *Town of Walkerton* v. *Erdman* (1894), 23 S.C.R. 352, at p. 366, where King, J., says: "If indeed the admissibility of the evidence were to depend upon the causes of action being the same the respondent could not hope to succeed, because it is conclusively established that the cause of action given by the statute is different from that which the deceased had in his lifetime."

The administrator can, I think, have no higher right than

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those for whom he has brought the action. If he had failed for six months to do so, the parents of the deceased man would themselves have had the right to institute the action; but, if they had done so, they would have been met with what would be a fatal defence, the plea that they were alien enemies. This would have disentitled them to succeed.

If I could see my way to do so, I would prefer to make an order staying the action, for the reason that, if it is dismissed, the statutory period may possibly run and so put an end to the action.

I think, however, I must hold that the action must be dismissed with costs.

*Action dismissed.*

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MAN.

K. B.

## RONALD v. LILLARD.

*Manitoba King's Bench, Curran, J. January* 11, 1915.

1. VENDOR AND PURCHASER (§ II—33)—VENDOR'S LIEN—ENFORCEMENT OF.

A vendor's lien upon real estate is enforceable by sale but not until it has been established by a judgment of the Court binding the persons affected by the lien; the vendor has the alternative right to rescind the contract and recover possession of the land.

2. VENDOR AND PURCHASER (§ II—32)—PURCHASER OF VENDEE—ASSUMPTION OF LIEN.

Where the purchaser of land under contract resells the same and a sub-purchaser assumes the indebtedness to the original vendor, and agrees to indemnify the original purchaser therefrom, the latter's lien as against the sub-purchaser's interest in the land extends not only to the cash portion of the unpaid purchase money due him, but to the balance so assumed by the sub-purchaser in respect of which the original purchaser remained under obligation to the original vendor.

3. MORATORIUM (§ I—1)—VENDOR'S LIEN—ENFORCEMENT OF.

The Moratorium Act, Man., does not prevent the enforcement of a vendor's lien for unpaid purchase money where nothing whatever had been paid and the lien was claimed for the whole purchase price.

Statement

ACTION on an assignment of an agreement for sale.

*A. Monkman* and *C. G. Barnardo*, for plaintiff.

*P. C. Locke*, for defendant.

Curran, J.

CURRAN, J.:—The facts of this case are not disputed. In fact, the only question between the parties is as to the legal effect of the notice (ex. 1) given by the plaintiff to the defendant, and as to whether or not the Moratorium Act applies.

The notice intimates to the defendant that if payment of the money demanded by it is not made within 14 days from the date

of service the plaintiff will proceed, without any consent or concurrence on the part of the defendant, and without any further notice to him, to enter into possession and receive and take the proceeds of the lands mentioned, and to sell and absolutely dispose of the land, either by public auction or private sale, etc., as the plaintiff may deem proper, and to convey and assure the same to any purchaser. This notice is dated August 20, 1914, is signed by the plaintiff in person, and was duly served upon the defendant.

It appears that the land in question—lot 11, in block 4, plan 2038, of the Winnipeg Land Titles Office—originally belonged to Seven Oaks Land Co., by whom it was sold to one Emil A. Schwab, together with the adjoining lot 10. An agreement to Schwab from this company (ex. 3) was duly executed and delivered. This agreement was, on June 5, 1914, by ex. 4, duly assigned to the plaintiff, and the land therein mentioned conveyed by the assignor Schwab to the plaintiff. By the assignment (ex. 2), dated July 17, 1914, the plaintiff assigned to the defendant his rights under the foregoing agreement and assignment, and conveyed to him his interest in lot 11 only in consideration of the sum of $737.11 to be paid in cash and the assumption by the defendant of $810, the moneys owing to the Seven Oaks Land Co. in respect of the original purchase mentioned in ex. 3. This assignment (ex. 2) was duly executed and delivered by the plaintiff and defendant, but the consideration, $737.11, was not then paid by the defendant, and has not since been paid. The defendant was let into possession, and thereafter proceeded to erect a building on the said lot, which is, however, uncompleted. The defendant covenanted with the plaintiff, in and by ex. 2, to assume and pay the sum of $810 to the Seven Oaks Land Co., and to indemnify the plaintiff therefrom. He has not paid this sum either, and so is altogether in default in respect to the matters which ought to have been performed by him.

The agreement from the Seven Oaks Land Co. (ex. 3) contained the usual proviso that the vendor upon default might determine the agreement by a 30-day notice. No such right or privilege is reserved to the plaintiff or in any way created by ex. 2, so that the notice in question given by the plaintiff to the defendant had no legal force or effect upon the defendant's rights as a purchaser or in any other respect. Such notice could amount

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to nothing more than any other form of demand for payment of a debt due.

The plaintiff had no extra-judicial contract right upon defendant's default to terminate the sale or to enter into possession of the premises. This could only be accomplished by resort to the Courts.

As admittedly the matters arising under this notice are the only ones apart from the effect of the Moratorium Act in dispute, I hold that the defence fails, and that the plaintiff is entitled to succeed unless the action is one which is prohibited from being brought at this time by this Act.

It is contended by the defendant that the Moratorium Act applies, and that no proceedings for the sale of this land can now be taken. The plaintiff contends that this Act does not apply, as a sale for cash of the land was contemplated and the statute was never intended to apply to cases where a purchaser gets a conveyance without paying over the consideration, and that, in any event, as the defendant admits abandonment of the land, the Act does not apply: *Vide* sec. 7.

The assignment of agreement (ex. 2) is absolute in form, and contains no power of sale whatever. The recitals in it are really merely explanatory of certain previous dealings with the land by which the plaintiff acquired a title. The covenant on the defendant's part to pay the Seven Oaks Land Co. $810 and interest is the only inchoate provision of the assignment. It seems to me the effect of the assignment is just as if the plaintiff had given the defendant a quit claim deed of his equity of redemption in the land in which deed there had been inserted a covenant by the defendant, as grantee, to indemnify the grantor against an incumbrance upon the land for which the grantor was personally liable.

The right to a vendor's lien for unpaid purchase money does not depend upon any provision in a deed or other instrument, but upon an implied contract on the part of the purchaser to pay the vendor the purchase money agreed upon. Here there is no denial by the defendant of the plaintiff's asserted right to a lien; in fact, the defendant admits this by his pleading. A vendor's implied lien for purchase money of land is of a purely equitable nature, and has no existence until established by a decree of a Court in a

particular case. An equitable lien may be defined as an equitable right conferred by law upon one man to a charge upon the real or personal property of another until certain specific claims have been satisfied. It differs from an equitable charge inasmuch as the latter is a right founded on contract, whereas an equitable lien is founded on the principle of equity that he who has obtained possession of property under a contract for payment of its value will not be allowed to keep it without payment: Hals., vol. 19, p. 14. Again, by the same author, a vendor's lien upon real estate is enforceable by sale, but not until it has been established by a judgment of the Court binding the persons affected by the lien. Again, the vendor has the alternative right to rescind the contract and recover possession of the land; but he cannot enforce it by foreclosure: Hals., vol. 19, at p. 27.

Section 2 of the Moratorium Act prohibits proceedings for the sale of any land under any power of sale contained in any mortgage of land, agreement to purchase land, or in any other instrument charging land with the payment of money *or otherwise existing* for default in payment, etc. What do the words "or otherwise existing" mean? I think they mean this, at all events, that the power of sale so otherwise existing must be a power existing under some authority before the proceedings are taken, and that it does not include the exercise of the power of the Court to enforce by sale of land an equitable right conferred by law.

The Act interferes with contract rights, and is in derogation of such rights. Its scope ought not to be extended beyond what the wording of the statute makes perfectly clear. Unusual financial conditions, attributed mainly to the war in which our country in common with the Motherland is now engaged, was the reason for the passing of such drastic legislation. Its object seems to have been to protect men against losing their land upon which they had given mortgages or which they had acquired by purchase upon terms of credit and were unable to pay for in consequence of temporary financial inability brought about by war conditions. Could it be said that such a case as the one under consideration, where the defendant has paid nothing at all, was in contemplation or was intended to be protected by this Act? I do not think so. It is true there is only one exception in sec. 2 from the inhibition, namely, liens under the Mechanics and Wage Earners Lien Act. Such liens were expressly created by statute

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for the protection of certain classes of persons. Why this exception was deemed necessary in the Act I do not know, unless the words "or otherwise existing" were inserted with the intention of extending the operation of the Act to every description of lien, however arising, created or declared, and hence to mechanics' liens also. If this be so, then doubtless the Act does prevent the enforcement of a vendor's lien for unpaid purchase money. I do not hold this view or so construe the Act, and I think that the enforcement of a vendor's lien arising, as in this case, for the whole of the purchase price, nothing whatever having been paid, is not interfered with by the Act, and must be given effect to in the usual way.

I do not wish to be taken as holding that this would be the result where part of the purchase price had actually been paid by a defendant, but I merely lay down the proposition that in the present case, where nothing at all has been paid, the Act should not and does not apply to prevent the plaintiff from obtaining redress.

Again, under sec. 7, where there has been an abandonment of the land by the purchaser, the Act does not apply. Abandonment has not been alleged by the plaintiff in his statement of claim, but the contrary, for he asserts that the defendant is still in possession. Doubtless the plaintiff thought that the defendant was in possession when he issued his statement of claim. However, the defendant, in clause 3 of his statement of defence, alleges that the plaintiff cancelled the agreement, retook possession of the land, and thereafter dealt with it as his own. Upon this admission I think I am quite justified in holding that there has been an abandonment, and on this ground exclude the operation of the statute. The plaintiff also asks for a declaration that his lien extends to the sum of $810 and interest which the defendant covenanted to pay the Seven Oaks Land Co. but did not pay when due and has not since paid. The liability of the defendant upon this covenant is not disputed. In fact, the defendant expressly admits it, and also his default. This $810 is principal money payable under the Schwab agreement to the Seven Oaks Land Co., but so far as the transaction between the plaintiff and the defendant is concerned, it really formed part of the consideration for the sale. The right of lien undoubedly extends to this sum also, and I so

hold. As to the wage item, there was only a matter of $10 in dispute, and the plaintiff is entitled to judgment against the defendant for $42.90 in this respect.

There will be judgment, therefore, declaring the plaintiff entitled to a vendor's lien on the land in question for the respective sums of $737.11 and interest and $810 and interest, as before stated, and, in default of payment within six months of these sums, to a sale of the land under the direction of this Court to realize these amounts, and to judgment for any deficiency arising upon such sale in respect of the said sum of $737.11 and interest only and the costs of suit. As the plaintiff admits he has not paid the sum of $810 and interest due the Seven Oaks Land Co., he will not be entitled to have this sum taken into account in computing any possible deficiency arising upon a sale.

In the alternative, if the plaintiff desires, he may have judgment rescinding the sale, and if necessary for possession of the land.

There will also be personal judgment for the plaintiff against the defendant for the sums of $737.11 with interest from the date of ex. 2, and for $42.90, the amount of wages due the plaintiff. The plaintiff is, of course, entitled to his costs of suit.

*Judgment for plaintiff.*

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## COCHLIN v. MASSEY-HARRIS CO.



*Alberta Supreme Court, Harvey, C.J., Scott, Stuart and Beck, JJ. March 26, 1915.*

1. NEW TRIAL (§ II—9a)—IMPROPER ADMISSION OF EVIDENCE—LETTERS—PROOF OF SIGNATURE.

Proof that a letter produced by a witness was written by the defendant company involves two elements, *viz.*, the signature of the person who signed and his authority, and, where objection was taken to the letter being given in evidence for failure to adduce such proof, a new trial may be ordered where the letter was admitted, and the question of its proof was, in effect, withdrawn from the jury, whose verdict depended on the effect to be given to such letter.

Statement

APPEAL from the judgment of Ives, J.

*McDonald, Martin & McKenzie*, for plaintiff, respondent.

*Lougheed, Bennett & Co.*, for defendants, appellants.

Harvey, C.J.

HARVEY, C.J.:—I agree with my brother Beck that the defendants are not entitled to a judgment dismissing the action on the ground that the seizure could have been lawfully made by

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the sheriff if he had taken the proper steps. I am of opinion, however, that they are entitled to succeed on this appeal, and that there should be a new trial.

The learned trial Judge, in his address to the jury, quite clearly informs them that there is no evidence of liability of the defendants without the letter to which my brother Beck refers. After having indicated this quite clearly in the early part of his charge, he sums up at the end with these words:—

> I think, therefore, that the question you should answer should be: Was this letter, ex. 6, a direction from the defendant to the sheriff which resulted in the seizure of the plaintiff's grain? If so, then I think the only other matter you have to deal with is to assess the damages.

When the letter was produced by a witness, objection was taken to its being given in evidence on the ground that it had not been identified. The record does not shew that any regard whatever was paid to this objection. This may have been due to the fact that the witness who produced it had been called by the trial Judge for the purpose of producing it, and that he did produce it in response to a request by the Judge, but, be that as it may, the objection appears to have been treated as if it had been an admission that the letter was the letter of the defendants.

The proof that the letter was that of the defendants involved two elements, *viz.*, the signature of the person who signed it and his authority. Proof of them might have been waived, and, perhaps, in the absence of objection, that might have been the result here, since the witness stated that he received the letter from the defendants. Objection, however, was taken, and, in my opinion, the letter should not then have been accepted as evidence without *primâ facie* evidence that it was the letter of the defendants. My brother Beck expresses the opinion that there were facts in evidence from which it might fairly be inferred that it was the defendants' letter. This may be so. I express no opinion, but, if the fact is in doubt, it is for the jury to say whether from these facts they do infer that it is the defendants' letter. That was not left to the jury. The trial Judge assumed that it was the defendants' letter both in allowing it to be accepted as evidence and in referring to it in his charge to the jury.

I think the letter was improperly received in the manner in

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which it was received, and that, if it had been received on the ground suggested, the jury should have been instructed with regard to it. It appears to me also that the argument that there was evidence other than the letter of the liability of the defendants carries the case no further, because the jury was given no instruction as to that, but, on the contrary, was told that the letter was the only evidence.

Harvey, C.J.

It is clear, therefore, in my opinion, that there was an improper reception of evidence, or, if not, at least a failure to give proper direction to the jury, and that there should be a new trial in consequence.

I express no opinion regarding the calling of the witness by the trial Judge. It is a matter not free from difficulty, and whether the trial Judge was right or wrong could not affect the conclusion I have reached, for, if he were wrong, the result would be a new trial, which I would allow on the other ground in any event. I would allow the appeal with costs and direct a new trial, the costs of the former trial to abide the result of the new trial.

Scott, J.
Stuart, J.

SCOTT and STUART, JJ., concurred with HARVEY, C.J.

Beck, J. (dissenting)

BECK, J., dissented.

*Appeal allowed.*

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## DART v. DRURY.

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*Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, and Haggart, JJ.A. March 12, 1915.*

1. TRUSTS (§ II B—57)—TRUSTEES—RIGHTS OF—COMPENSATION.

Sec. 49 of the Trustee Act, R.S.M. 1913, ch. 200, does not give a trustee a statutory right to remuneration where his trusteeship is created for his own purposes and to protect his financial interest without any express provision for remuneration, and where the trustee assuming the trust under such circumstances had orally agreed with the other parties that he was not to be paid any remuneration, his petition under the Act for an allowance in that respect is properly refused.

2. PARTNERSHIP (§ IV—16)—PARTNERSHIP REAL ESTATE—SUBDIVISION LAND —JOINT UNDERTAKING.

Where persons acquired certain land in common with the intention of sub-dividing it into lots and selling them as a joint venture out of which each is to receive a portion of the profits, a partnership is created in respect to the contemplated transactions.

[*Manitoba Mortgage Co.* v. *Bank of Montreal*, 17 Can. S.C.R. 692, followed.]

APPEAL from a judgment of Galt, J.

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Richards, J.A.

*C. P. Wilson*, K.C., and *W. C. Hamilton*, for appellant.

*A. E. Hoskin*, K.C., for respondent.

HOWELL, C.J.M., and CAMERON, J.A., concurred with RICHARDS and PERDUE, JJ.A.

RICHARDS, J.A.:—Mr. Dart, in March, 1906, by contract in writing, sold lands, owned by himself, to himself and Messrs. Drury and Maddock, for $60,000, of which only $5,000 was paid at the time of sale.

The land was to be subdivided and sold by Maddock. Dart was to retain the registered title and to carry out and receive the proceeds of the sales, and Maddock was to collect and pay over to Dart the purchase money on such sales.

Out of the money so received Dart was to pay Maddock certain specified percentages for making the sales and collections.

The balance of these moneys, after paying some disbursements, was to be paid over to the three purchasers in equal shares. But the purchasers, again, were to pay Dart the postponed payments of the $60,000 purchase money, with interest, so that, in effect, the moneys so realized by the sales were to be first applied in payment of the balance of the original purchase money.

The above is the effect of the written agreement entered into between the parties, and practically carried out by them. That writing expressly provides for the payment to Maddock of the above percentages, but makes no provision for any remuneration for Dart's services. In October, 1913, Dart presented a petition to the Court of King's Bench, asking to be allowed remuneration for his care, pains, trouble and time expended in and about the trusts of carrying out his part of the agreement. The petition was dismissed by Mr. Justice Galt, and Mr. Dart has appealed to this Court.

The respondents claim that the petitioner is not entitled for three reasons:—1st. That, as they assert, he retained the title and performed the services in question solely for his own protection. 2nd. That, as they assert, it was agreed, when entering into the contract in question, that he was not to be paid for such services. 3rd. That the contract created a partnership as to the land and the proposed dealings with it, and that, therefore, in the absence of an express or implied agreement that he should

be paid. Mr. Dart was, as a partner, entitled to no pay for his services.

The sales of lots apparently realized between $145,000 and $150,000. Of this, $55,000, with interest, really went to the petitioner, to pay for the land. Then, he was entitled to a third of the balance. So that he was personally interested to the extent of nearly two-thirds of all the moneys realized. He made no bargain for remuneration. It is apparent that, when the contract was made, he did not know of the statutory provision for payment of trustees. About three months after making the contract, he was made a trustee for himself and others (not including Drury or Maddock) in regard to another property to be put on the market. In that case he bargained for pay for his services.

In November, 1907, he and Drury and Maddock made a supplementary contract in writing, affecting the property now in question and other properties, for which parts of it had been exchanged, and, in making it, he set up no claim for remuneration. Both Drury and Maddock swear that it was part of the real consideration for their entering into the contract to buy at the $60,000, that Dart should act as trustee. He nowhere denies this statement, as far as I can see. They say that he insisted on holding the title in his own name for his own protection. I do not find that he specifically denies that. He says that Maddock suggested his acting as trustee. But he does not suggest that he otherwise would not have so acted. The work he did in checking over the accounts with the different purchasers and in executing agreements of sale and transfers would have had to be done by him to at least the same extent if the title had been vested in himself, Drury and Maddock, instead of in himself alone.

It was most natural, in view of his preponderating interest, that he should wish to hold the title. In fact, until he should be paid the $55,000 and interest, such a course was reasonably essential to his own protection in the matter. It may here be mentioned, too, that he was further protected by a condition in the agreement that enabled him to forfeit the share of either of the other parties, on the happening of certain defaults in meeting their shares of the periodical payments to him on the purchase price. Drury and Maddock say that it was never contemplated,

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or agreed, that Dart should receive remuneration, and he does not deny that. Drury swears he would not have gone into the transaction if he had known that Dart meant to charge. It was not until a comparatively short time before presenting the petition that Dart made any claim. He then told Maddock of his intention, but he appears to have never told Drury.

On a careful consideration of the evidence, I think it appears that Dart performed his services and held the title mainly, if not solely, for his own protection. I further think it was implied, and fully understood, that he was to give his services without charge. He knew nothing of any statute providing for payment of trustees, and he knew that, on the face of the agreement, provision was being made to pay Maddock, while nothing was said as to his being paid. I do not think that sec. 49 of the Manitoba Trustee Act even was intended to mean that a trustee should be paid in a case where he became such for his own purposes, or in a case where it was understood that he was not to be paid. In *Manitoba Mortgage Co.* v. *Bank of Montreal*, 17 Can. S.C.R. 692, three persons had bought land together and had subdivided it into town lots and sold them. It was held by the Supreme Court that their so doing created a partnership in the matter. I am unable to distinguish that case from the present one on that point. The fact that there the title was vested in all three of them, while here it remained in one, is immaterial. That case seems to me an authority for the holding that, in this case, there was, as to the dealings with the land, a partnership between Dart, Drury and Maddock.

Section 27 of the Partnership Act provides that the interests of partners in the partnership property, and their rights and duties in relation to the partnership, shall be determined, subject to any agreement, express or implied, between the partners, by certain rules, one of which says:—"(*f*) No partner shall be entitled to remuneration for acting in the partnership business." If I am right (following *Manitoba Mortgage Co.* v. *Bank of Montreal*, cited above) in holding that the dealings in question constituted a partnership, then Mr. Dart has no claim to the remuneration he asks for. The above section and sub-section (*f*) distinctly say he has not, unless under some agreement, express or implied. The contract shews there was not an express one, and the evidence shews that none was implied.

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I express no opinion that a partner cannot, in addition to his share under the partnership agreement, express or implied, claim remuneration under any rule of equity or common law applicable to partnership, and not inconsistent with the Partnership Act. Such rights, if any, are, perhaps, retained by sec. 3 of that Act. I do not, however, see that any such situation arises here, even if it could be dealt with under the petition now before us, which I doubt. I would dismiss the appeal with costs.

Richards, J.A.

PERDUE, J.A.:—The appellant, Dart, claims that he acted as a trustee for himself, Maddock and Drury in taking charge of and administering certain property and funds, and that, consequently, he is entitled to compensation under the Trustee Act, R.S.M. 1913, ch. 200, secs. 48-51. Dart had acquired certain lands near Winnipeg, part of which consisted of town lots, the remainder being 160 acres of unsubdivided land. An agreement was entered into by Dart with Drury and Maddock on March 1, 1906, whereby he agreed to sell to each of them an undivided one-third interest in the above-mentioned real estate. The agreement was prepared by one of the parties and, although it is unskilfully drawn and in parts not very clearly expressed, there is no dispute between the parties as to the meaning to be placed upon it. The land was taken at a valuation of $60,000. Drury and Maddock each agreed to pay Dart $20,000 by instalments for an undivided one-third interest, Dart to furnish a clear title and to hold the interest of the other parties in trust for them. The main object of the agreement was to subdivide the land nto town lots and sell them at a profit, the profits to be divided between the three parties.

Perdue, J.A.

It was agreed that Maddock, who appears to have had skill and experience in business of this nature, should have the land surveyed into lots as he deemed advisable, that the plans should be registered, and that he should make the sales. For doing this work Maddock was to receive a commission and was also to be paid his outlay for taxes and other expenses. Dart agreed to convey the lots sold to purchasers, on Maddock's request, and on receiving payment of a certain proportion of the purchase money. All moneys received on account of sales were to be paid to Dart and deposited by him in a special account. These moneys, after paying the commission and expenses, were to be

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divided equally between the parties. Apparently the intention of the agreement was that Maddock and Drury should pay the instalments of purchase money due from them to Dart from their shares of the moneys coming to them on each monthly division. This was the practice adopted.

The land was subdivided into lots, placed on the market, and the first sale made in April, 1906. Dart signed the agreements of sale to purchasers and Maddock paid to Dart the money collected. By reason of purchasers making default under their agreements, many cancellations took place, and the lots had to be re-sold. Parts of the property were exchanged for other lands, which had to be disposed of. A great burden of responsibility was, no doubt, thrown upon Dart, who had to inquire into and assume the validity of the cancellations. He had also to ascertain the correctness of the account with each purchaser before executing and delivering the conveyance. He had also the duty of taking charge of and administering the moneys received. There is no doubt that Dart assumed a position of responsibility and of some difficulty extending over a number of years. All this is strongly urged as entitling him to remuneration as a trustee.

The agreement shews that the persons who were parties to it acquired the land in common, with the intention of dividing it into lots and selling them with a view to profit. There was, therefore, a partnership between them as to this particular business or adventure. That this was the relationship between the parties appears to me to have been settled by the decision in *Manitoba Mortgage Co.* v. *Bank of Montreal*, 17 S.C.R. 692. In that case three persons had engaged in joint speculations in the purchase and sale of lands. It was held that a partnership in respect of that business existed between them. In the judgment of Patterson, J., with whom the other members of the Court agreed, the following passage from Lindley on Partnership was cited with approval:—

> If persons who are not partners in other business share the profits and loss, or the profits, of one particular transaction or adventure, they become partners as to that transaction or adventure, but not as to anything else: Lindley on Partnership, 5th ed., p. 49; 7th ed. p. 67.

I would also refer to the definition of partnership in sec. 4 of the Partnership Act, R.S.M. 1913, ch. 151, and to the rules

for ascertaining the existence of a partnership contained in sec. 5.

The general rule is that, if a partnership exists between persons, none of them is entitled to remuneration for acting in the partnership business unless there was an agreement, express or implied, allowing such remuneration: Partnership Act, sec. 27 (*f*). In the present case there is no provision in the agreement giving Dart remuneration for the services which he undertook to perform. There is, at the same time, a very complete provision as to the commission to be paid to Maddock for his services and as to the payment of other necessary expenses. If it had been contemplated that Dart was to receive remuneration, it would surely, one would think, have been mentioned in the written agreement when the question of paying commission to Maddock and the payment of other outgoings were under consideration. So far from shewing that there was any implied agreement as to paying remuneration to Dart, the evidence expressly excluded it. In his affidavit filed in support of his petition he does not even suggest that there was any agreement or understanding that he was to receive pay for his services. Both Drury and Maddock positively assert that there was no such agreement. They assert that Dart insisted upon holding the title to the property in his own name in order that he might be secure as to his purchase money.

In a subsequent agreement made between the same parties on November 11, 1907, relating to certain lands received in exchange, the agreement of March 1, 1906, is referred to as a "declaration of trust." The purpose of the later agreement was to place the lands received in exchange in Dart's hands, under the same trust as that under which he held the lands mentioned in the first agreement. The earlier agreement did contain a declaration of trust on the part of Dart, but this was a mere incident of the main agreement, which was one creating a partnership in the transactions relating to the lands.

I do not think that the appellant has established a status of trusteeship entitling him to remuneration under the provisions of the Trustee Act. I would simply decide that he has failed to bring himself within the purview of the Trustee Act, and would express no opinion as to whether he might or might not be able, in some form of action, to shew that he was entitled to

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an allowance for services performed exclusively by him which should have been performed by his other partners or by one of them or in which he should have received their assistance.

I think the order of Galt, J., should be affirmed, and the appeal dismissed with costs.

Haggart, J.A. (dissenting)

HAGGART, J.A., dissented. *Appeal dismissed.*

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## BERGH v. FROST.

*Alberta Supreme Court, Walsh, J. March 30, 1915.*

1. VENDOR AND PURCHASER (§ I E—27)—RESCISSION OF CONTRACT—MISREPRESENTATION BY VENDOR AS TO EXTENSIONS BY MORTGAGEE—PROXIMATE CAUSE.

A purchaser of land who seeks damages from his vendor because the latter concealed from him the fact that the right to call upon the mortgagee to postpone his mortgage in favour of a new mortgage had already expired, is bound to prove that injury resulted to him from the deliberate concealment of that fact.

2. FRAUD AND DECEIT (§ IV—15)—WHAT CONSTITUTES—KNOWLEDGE AND BELIEF—INTENT.

Fraud is proved when it is shewn that a false representation has been made knowingly or without belief in its truth or recklessly, careless whether it be true or false.

[*Derry* v. *Peek*, 14 A.C. 337, applied.]

Statement

ACTION for damages for misrepresentation.

*H. P. O. Savary*, for plaintiff.

*G. H. Ross*, K.C., and *J. T. Shaw*, for defendants.

Walsh, J.

WALSH, J.:—The plaintiff exchanged with the male defendant some Calgary property for a farm owned by the latter. His action is for rescission on the ground of misrepresentations as to the farm, or in the alternative damages. At the close of the trial I dismissed the claim for rescission for reasons then given. This ended the action so far as the wife and co-defendant of the male defendant is concerned, the only claim made against her by the pleadings being for rescission, the title to the land transferred by the plaintiff in this deal having since become vested in her. The claim for damages is made against the male defendant alone, and to him I will hereafter refer as the defendant.

The misrepresentations complained of are thus described in the statement of claim:—

That there was situate on the said quarter-section a new house, which cost the sum of $1,800; that the said house was insured for the sum of $900; that there were upon the said land over 500 shade trees around the house;

that there was on the said land stabling for 16 horses, a hen house, machine shed, and another shed, and that there were also two wells upon the said land; and the defendant Thomas A. P. Frost also represented to the plaintiff that he had an agreement with a former owner of the said quarter-section, who held a mortgage thereon for $600, which would allow the privilege of placing a loan on the said quarter-section up to $1,200 as a first mortgage thereon, and that the said former owner would accept a second mortgage for the $600 due to him.

The plaintiff did not see the farm before the exchange was made. He was urged by the defendant to go out and see it before closing the deal, and he intended doing so, but something turned up to prevent it. And so he made the exchange relying upon and knowing nothing more of the farm than what the defendant and his agents told him of it. The defendant had not then nor has he ever since seen this farm, and this he very candidly told the plaintiff. He told him that all that he knew of it was what the man of whom he bought it had told him. And then he professed to tell the plaintiff what it was that had thus been told him. The plaintiff thoroughly understood this, and quite realised that what the defendant was giving him was a description of the buildings and improvements, not as he actually knew them to be, but as his vendor had represented them to him.

There is no doubt as to what these representations were, for besides the oral evidence of them there is written proof of them in a writing (ex. 11) prepared for the purpose by the defendant, the material portions of which are:—

1 new house cost $1,800, 26 x 32, insured for $900, over 500 shade trees around the house, stabling for 16 horses, hen house 12 x 14, machine shed and shed 12 x 14, granaries 12 x 16, 2 wells.

Harmon, the defendant's vendor, was called as a witness by the plaintiff, and he swore that he told the defendant that there were upon the farm over 500 shade trees, stabling for 16 horses, a hen-house, a machine shed, another shed, and two wells. In these respects, therefore, no charge of misrepresentation will lie against the defendant.

In two other respects, however, I am of the opinion that there was misrepresentation by the defendant. The buildings other than the house and granary were absolutely valueless when he bought this property from Harmon and when he dealt it off to the plaintiff, and he did not inform him of that fact. That he knew it is plain from his affidavit under the Unearned Increment Tax

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which accompanied the transfer to him from Harmon. The only buildings sworn to by him as having a value were the house and the granary. Harmon's affidavit on the same transfer goes further, for, after putting the same value on the house and granary as was given to them by the defendant's affidavit, it says: "Sod buildings no value."

I do not think it fair to saddle the defendant with knowledge of what Harmon thus swore to, for the evidence does not satisfy me that he was familiar with the details of Harmon's affidavit. For what he swore to himself he is of course responsible, and he cannot very well complain if his sworn statement that the only outbuilding that was worth anything at all was the granary is accepted as decisive of the fact that he learned from Harmon when buying this farm that this was the case. Harmon did not tell the defendant that it was a new house. That part of his representation to the plaintiff was, therefore, untrue. As a matter of fact the house had been built some six or seven years at that time, and was, therefore, not new. The evidence shews that a house costing $1,800 which could in 1914 be fairly described as new would, owing to changed general and local conditions, be a considerably better house than one built for the same money when this house was built.

The house was at the date in question insured for $900 under a policy which is still current, and there was, therefore, no misrepresentation as to that. The only argument advanced by Mr. Savary under this head was that the policy is in the name of the plaintiff's vendor, Harmon, who is a mortgagee of this land, and therefore has an insurable interest in the house. It may be that the policy is not of value because of the fact that the company has not been notified of and has not consented to the changes in ownership which have occurred since its date, but I cannot attribute fraud to the defendant in this connection simply because of that.

The representation as to the willingness of the mortgagee to postpone his first mortgage of $600 to a mortgage of $1,200 to be negotiated by the defendant is in writing, and so there is no room for doubt as to its nature. The fact is that although the right to place a $1,200 mortgage ahead of this $600 mortgage was secured to the defendant by writing under the hand and seal of

the mortgagee, it limited the time within which this right might be exercised to a period which had at the date of the defendant's representation to the plaintiff actually expired, and yet no reference whatever to this time limit or to the fact that the privilege referred to had expired was made by the defendant. He explains this by saying that he made this statement solely for the purpose of giving the plaintiff an idea of the estimation in which the mortgagee held this land, but I have found it impossible to accept this explanation. I think he made it as a material inducement to the plaintiff, pointing out as it did an easy method available to him for the raising of the money which he expected to need in the carrying on of his operations on the farm. The defendant must have known of this time limit, for it is plainly set out in the agreement, which was then in his possession. I think that its non-disclosure was deliberate. The difficulty in the plaintiff's way, however, is that he has quite failed to shew any damage resulting from this concealment, and fraud without damage is not actionable—at least in the form of action with which I am now dealing. It is not suggested that he applied for a loan, or that any loss or even inconvenience resulted to him because of the fact that the mortgagee was no longer bound to give the priority to another mortgage stipulated for by his agreement. And so, in my opinion, the defendant is not liable in damages for this wrong.

The plaintiff's right to damages, therefore, rests upon my finding that the defendant misrepresented the age of the house and concealed his knowledge of the fact that the outbuildings other than the granary were valueless. I must determine whether or not these acts of misrepresentation and concealment were, or either of them was, fraudulent, for of course an action of deceit can only be founded on fraud.

Lord Herschell, in *Derry* v. *Peek*, 14 A.C. 337, gives a definition of fraud, sufficient and necessary to sustain an action of deceit, in the following words:—

> Fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false.

In my opinion the facts of this case bring it within this definition so far as the defendant's representation as to the age of the house is concerned. I have found that Harmon did not tell him that the house was new. I do not think that he had any reason to

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believe that Harmon had told him that it was. I am of the opinion that he did not honestly believe that Harmon had made this representation to him. For the damages resulting from this misrepresentation I must, therefore, hold him liable.

I think that the non-disclosure of the fact that the outbuildings except the granary were of no value was an active misrepresentation for the damages resulting from which the defendant must be held liable. He undertook to tell the plaintiff the substance of everything that Harmon had told him about the place. He did tell him correctly all that he had heard from Harmon of these outbuildings except the fact that they were worth nothing. I must conclude that the concealment of that fact was intentional. His description of them evidently induced the belief on the plaintiff's part that they were worth $200, for that is the value attributed to them in his affidavit accompanying the transfer, an affidavit which was probably founded on the defendant's affidavit on the same transfer giving them the same value. The value of these buildings was a material element in this transaction, and in my opinion the concealment of the fact that they had no value gives to the plaintiff a right of action for damages. This is more than a case of mere silence with respect to a matter which the defendant was not bound to speak of. It is a case of professing to tell all that he knew about certain features of the property and withholding deliberately a material fact. That, under the authorities, is fraud.

I assess the damages to which the plaintiff is entitled in respect of the misrepresentation as to the house at $500, and those with respect to the outbuildings at $200. There will be judgment against the defendant, Thomas A. P. Frost, for $700 and costs. The action is dismissed as against the defendant Fanny Frost, but without costs. The defendants did not sever in their defences, and really the only additional costs occasioned by her joinder were those incurred in her examination for discovery and her attendance as a witness at the trial.

*Judgment for plaintiff.*

## Re LAKESIDE PROVINCIAL ELECTION.

## TIDSBURY v. GARLAND.

MAN.

C. A.

*Manitoba Court of Appeal, Richards, Perdue, Cameron, and Haggart, JJ.A. February 24, 1915.*

1. ELECTIONS (§ IV—90)—CONTESTS—PETITIONING VOTERS — QUALIFICATIONS OF.

The status of the petitioners as voters qualified to vote and so to bring a petition under the Controverted Elections Act, Man., may be shewn by the list of voters for the election as revised by the Revising Officer, and identified by him and the Clerk of the Executive Council; and it is not essential that such proof should be supplemented by proving that the petitioners' names were also on the list furnished to the deputy returning officer, and used at the poll.

[*Richelieu Election Case*, 21 Can. S.C.R. 168, distinguished; *Re Macdonald Election*, 8 D.L.R. 793, 23 Man. L.R. 542, and *Re Provencher Election*, 13 Man. L.R. 444, referred to.]

2. ELECTIONS (§ IV—90)—CONTESTS—PETITIONING VOTERS — QUALIFICATIONS—CITIZENSHIP—AGE.

The revised list of voters is conclusive as to the right to vote at a Manitoba Provincial election subject to the voter taking the oath if called upon to do so; consequently an election petition under the Controverted Elections Act, Man., will not be set aside on a preliminary objection that the petitioners were not proved to be British subjects and twenty-one years of age where their names appeared on such revised list and no other evidence was given on that question.

3. ELECTIONS (§ IV—90)—CONTESTS—CASH DEPOSIT—INSUFFICIENCY.

The receipt of the prothonotary for the deposit of $1,000 accompanying an election petition under the Manitoba Controverted Elections Act is evidence of its sufficiency (sec. 20) in answer to a preliminary objection and throws upon the respondent the onus of shewing that the deposit was not made in bills of a chartered bank (sec. 19).

4. ELECTIONS (§ IV—90)—CONTESTS — PETITION FOR — REGULARITY OF OATH.

It is not an objection to an election petition under the Controverted Elections Act, Man., that the petitioners took the oath before the commissioner on making the verifying affidavit with uplifted hand without the use of a testament and without its being shewn that they had any conscientious scruple against taking an oath upon the book.

[*Curry* v. *The King*, 15 D.L.R. 347, 48 Can. S.C.R. 532, 22 Can. Cr. Cas. 191, applied.]

5. ELECTIONS (§ IV—90)—CONTESTS—REGULATIONS — RULES — ENGLISH PRACTICE.

The Controverted Elections Act, Man., has the effect of repealing the rules passed under the former Act and substituting the English election petition rules as in force in England on May 26, 1874, until new rules shall be promulgated under the Manitoba Act.

Statement

APPEAL from order of Galt, J., 20 D.L.R. 286.

*H. J. Symington*, for petitioners, respondents.

*A. J. Andrews*, K.C., and *F. M. Burbidge*, for respondent, appellant.

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Richards, J.A.

RICHARDS J.A.:—I agree with the learned Judge, whose decision is appealed from, and with the judgment of my brother Perdue, and think the appeal should be dismissed. I wish, however, to state my view as to the security question.

Sec. 20, referring to the deposit of money with the prothonotary, as such security, says:—

> 20. The prothonotary of the Court shall give a receipt for such deposit, which shall be evidence of the sufficiency thereof.

The petitioners met the objection to the security by producing such a certificate. Then they—unnecessarily I think—went further and called a high official of the chartered bank, with bills of which the deposit had been made.

It is claimed by the respondent that the cross-examination of this official left it doubtful whether the bills deposited were, in truth, the bills of that bank, and that, therefore, by using his evidence, the petitioners so discredited the validity of those bills that it should be held that they had failed to prove compliance with the provision of sec. 19, sub-sec. 3, that the deposit had been made "in the bills of some chartered bank doing business in Canada."

Taking that evidence most strongly against the petitioners, I find nothing in it tending to prove that the bills were not his bank's bills as contemplated by the above. The utmost that could be argued from it would be that the witness did not conclusively prove that they were his bank's bills. It therefore seems to me, at the worst, to leave the matter in no worse position than if he had not been called. The deposit had already been proved by production of the prothonotary's certificate, which, by section 20, is made evidence of its sufficiency. That fulfilled the onus on the petitioners, and threw on the respondents the onus of shewing that the bills were not bills within sec. 19, sub-sec. 3.

The respondent made no attempt to do so, except by cross-examining the petitioners' witness, as above, and, while the evidence of that witness may not have proved the validity of those bills, it certainly did not disprove it. So that nothing was shewn to meet the at least *primâ facie* case made by producing the prothonotary's certificate.

All that happened was this. The petitioners sufficiently proved their deposit by producing the certificate. Having so proved it they called other evidence for the same purpose. If this latter evidence merely failed to prove the deposit, that fact in no way invalidated the sufficient proof that had previously been given.

PERDUE, J.A.:—This is an appeal from the order made by Galt, J., dismissing the preliminary objections filed by the respondent. The petition is filed under the Manitoba Controverted Elections Act against the return of a member for the electoral division of Lakeside. Thirty-nine preliminary objections were filed, but only six of these were argued on the appeal. The first was, briefly, that the status of the petitioners had not been established. It was objected on the part of the respondent that the petitioners had not proved that they were on the list furnished to the deputy returning officer and used at the poll. Sec. 10 of the Controverted Elections Act provides that a petition may be presented by any one or more of the following persons:—

(*a*) A person who had a right to vote at the election to which the petition relates; or, (*b*) A candidate at such election.

The petitioners claim that they were qualified to present the petition under (*a*), as persons who had the right to vote at the election in question. In proof of their status as voters the petitioners caused to be produced the list of voters for the election in question as revised by the revising officer, who was sworn as a witness and identified the list. The clerk of the executive council of the province was also called as a witness and he proved that the list was the original list, as finally revised, for the electoral division of Lakeside, for the election held in July, 1914, being the election in question. The printed list bearing the imprint of the king's printer was also produced and proved. The clerk of the executive council also proved that he had forwarded to the returning officer for Lakeside a copy of the voters' list for that electoral division thoroughly checked over and certified and being an exact copy of the original. Both in the original list and in the printed list the names of the petitioners, with their residence and occupation, appeared as persons entitled to vote.

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Perdue, J.A.

The list furnished to the deputy returning officer for use at the poll was not produced and the respondent argues that it was this list which actually conferred the right to vote. He relied upon the *Richelieu Election Case*, 21 Can. S.C.R. 168, as authority in his favour. In that case the status of the petitioner as a voter was sought to be proved by the production of a copy of the list certified by the revising officer, and this was the only proof offered as to his right to vote. It was held that this was not sufficient evidence, and that the status, if questioned, should be established by the production of the voters' list actually used at the election or a copy thereof certified by the Clerk of the Crown in Chancery. The statute under which *Re Richelieu Election* was decided was the Dominion Elections Act, R.S.C. 1886, ch. 8. By sec. 41 of that statute it was enacted that:—

> All persons whose names are registered on the *lists of voters for polling districts* in the electoral division, on the day of the polling at any election for such electoral division, shall be entitled to vote at any such election for such electoral district *and no other person shall be entitled to vote thereat.*

It was held under this and other provisions of the same statute that no person had an actual right to vote unless his name in fact appeared on the list of voters furnished to the deputy returning officer for the polling district in which the vote was tendered. There is no similar provision in the Manitoba Election Act. The status of the voter under that Act is determined by sec. 217, which declares that:—

> Every person whose name appears as an elector on the list made as by this Act provided, and in force at the time of any election to which this Act applies, *shall be entitled to vote at such election*, if at the time of such election he is not disqualified, etc.

The fact was established that the names of the petitioners were on the list of voters for the electoral division of Lakeside, as such list had been revised and closed under the provisions of the Act. Under secs. 128-129 that list became "binding and conclusive" and constituted the list of electors for that electoral division.

In *Re Macdonald Election*, 8 D.L.R. 793, it was held by Cameron, J.A., that under the present Dominion Elections Act the status of the petitioners and their right to vote were suffi-

ciently proved by the production of a copy of the original list of voters bearing the imprint of the king's printer. In so holding he followed *Re Provencher*, 13 Man. L.R. 444, in which case Bain, J., pointed out that by reason of changes in the statute *Re Richelieu* was no longer applicable. *Re Macdonald*, was appealed to this Court and the appeal withdrawn. The case was also appealed to the Supreme Court and the decision of Cameron, J.A., was there affirmed.

I think the objection as to status should be overruled.

A further objection was taken that it had not been proved that the petitioners were British subjects and twenty-one years of age. These facts were no doubt established to the satisfaction of the registration clerk when he entered their names on the list of voters and the list is conclusive as to the right to vote, subject to taking the oath under sec. 225, if called upon to do so.

The next objection was as to the security furnished. It was shewn that $1,000 in the bills of the Northern Crown Bank, a chartered bank doing business in Canada, had been deposited with the prothonotary of the Court as security under sec. 19 of the Controverted Elections Act. The receipt of the prothonotary for such deposit was put in, and this, under sec. 20 of the Act, was evidence of its sufficiency. An official of the bank gave evidence that the bills comprising the deposit, which were produced in Court, were valid bills of the bank and would be redeemed by the bank on presentation. The objections to the deposit were devoid of merit and trivial, and should be over-ruled.

The next objection is directed against the affidavits of the petitioners verifying the petition. The commissioner for taking affidavits, before whom the affidavits in question were sworn, was called by the respondent and stated that he had administered the oath to each of the deponents in the same way by saying, "you swear this affidavit to be true, so help you God," and the deponent then took the oath with uplifted hand. A copy of the Bible was not used in administering the oath. It is objected that the affidavits were not properly sworn because it was not shewn that the deponents had any conscientious scruple against taking an oath upon the Bible. The point is settled by

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the decision of the Supreme Court of Canada in *Curry* v. *The King*, 15 D.L.R. 347, 22 Can. Cr. Cas. 191, 48 Can. S.C.R. 532. In that case it was held that a witness who testified to what was false was guilty of perjury where, without being asked if he had any objection to being sworn in the usual manner, but without objecting to the form used, he took the oath by raising his right hand instead of kissing the Bible. I would particularly refer to the passage cited by Mr. Justice Anglin from the judgment of Martin, B., in *Miller* v. *Salomons*, 7 Ex. 475, 515, which is as follows:—

> The doctrine laid down by the Lord Chancellor and all the other Judges (in *Omichund* v. *Barker*, 1 Atk. 21) was, that the essence of an oath was an appeal to a Supreme Being in whose existence the person taking the oath believed, and whom he also believed to be a rewarder of truth and an avenger of falsehood, and that the form of taking an oath was a mere outward act not essential to the oath.

In my opinion the objection fails.

It was also objected that there was not evidence that a copy of the petition was left with the prothonotary to be sent to the returning officer. The evidence of the solicitor and of the prothonotary established that the requirements in this respect had been complied with.

A further objection was that Rule 10 passed under the former Controverted Elections Act had not been complied with. That rule required the publication in the *Manitoba Gazette* and in a newspaper of a notice of the presentation of the petition. The validity of this objection wholly depends upon the question whether the old rules are still in force. Sec. 96 of the present Act expressly repeals the former Controverted Elections Act, R.S.M. 1913, ch. 39. Sec. 89 of the present Act confers on the Judges of the Court power to make rules and orders regulating the practice and procedure under the Act. Sec. 90 of the Act provides that until rules of Court have been made by the Judges of the Court in pursuance of this Act, and in so far as such rules do not extend, the principles, practice and rules under which election petitions were dealt with in England on May 26, 1874, shall be observed. The Act therefore clearly provides that the Judges may make rules regulating the practice and procedure under the Act, and that until such rules shall have been made,

the English rules shall be observed so far as they are consistent with the Act. The clear intention is to repeal the old Act and the old rules and to substitute the new Act with the English rules, or with the new rules when they shall have been made by the Judges. The argument based on sec. 33 of the Interpretation Act, R.S.M. 1913, ch. 105, is not applicable.

I think the appeal should be dismissed with costs.

Perdue, J.A.

CAMERON, and HAGGART, JJ.A., concurred with PERDUE, J.A.

Cameron, J.A.
Haggart, J.A.

*Appeal dismissed.*

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## TODESCO v. MAAS.

ALTA.
S. C.

*Alberta Supreme Court, Harvey, C.J., Scott, Stuart, and Walsh, JJ. February 16, 1915.*

1. AUTOMOBILES (§ III B—253)—INJURY TO PEDESTRIAN WHILE WAITING FOR CAR—FAILURE TO LOOK—CONTRIBUTORY NEGLIGENCE.

A pedestrian crossing a wide street who stops in the roadway at a safe place beside the street car track for a street car to pass and then walks back in the direction from which he came without looking for approaching vehicles is himself guilty of negligence disentitling him to recover where, in retracing his steps, he walked in front of an automobile proceeding at a moderate rate of speed and was knocked down and injured before the motorist could avoid him.

APPEAL from a judgment of Beck, J. Statement

*Frank Ford*, K.C., and *M. M. Charleson*, for plaintiff, respondent.

*O. M. Biggar*, K.C., and *G. C. Dalton*, for defendant, appellant.

The judgment of the Court was delivered by

WALSH, J.:—The plaintiff was knocked down and run over by an automobile owned and driven by the defendant, and as damages for the injuries resulting from this accident, Beck, J., who tried the case without a jury, awarded him $1,750. From this judgment the defendant appeals. No reasons for judgment were given by the learned Judge, a fact due to the serious illness from which he suffered during the interval between the conclusion of the trial and the delivery of judgment and from which he was only recovering at the latter date. His judgment means, of course, that in his opinion, the defendant was guilty Walsh, J.

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of negligence or rather perhaps that he had not satisfied the onus put upon him by sec. 33 of the Motor Vehicle Act of shewing that the damage complained of did not arise through his negligence or improper conduct and also that in his opinion the plaintiff had not contributed to the accident by his own negligence.

The accident occurred at or near the intersection of Jasper avenue with 3rd street in the city of Edmonton, this being a point in the business section and on the principal thoroughfare of the city. The chief, if not the only material fact in controversy is as to the exact place in this locality where it happened. The plaintiff and his two witnesses put it practically at the intersection of the westerly side of the street with the avenue, while the defendant and his witnesses put it at or a little east of the easterly intersection, while all parties agree that it happened on the south side of the avenue between the curb and the nearest rail of the street railway system. The principal importance attaching to this part of the case is the bearing that it has upon the rate of speed at which the defendant's car was moving when it hit the plaintiff. When the car was stopped, the rear end of it was on the avenue, practically at the eastern intersection of the street and the plaintiff was lying under and towards the back of it. If the plaintiff's description of the *locus* is the true one, it follows that the defendant must have been running his car at a very high rate of speed at the time of the impact, for it must, in that event, have travelled at least the width of the street, something over eighty feet, before it was brought to a stop, and the defendant says he stopped it as soon as he could after he struck the plaintiff. If, on the contrary, the evidence of the defendant and his witnesses in this respect is to be believed, the car must then have been running at a very moderate rate of speed, for it was stopped in less than its own length after it struck the plaintiff. In the absence of any express finding as to this by the trial Judge, I have no hesitation in saying that the evidence, in my judgment, overwhelmingly preponderates in support of the defendant's version of it. I think that the plaintiff was at the time in such a condition that he could not speak with certainty as to either time or place,

while the evidence of his two witnesses is so filled with inaccuracies and improbabilities that one might be justified in doubting whether or not they were even at the spot when the accident happened. The evidence of the defendant himself is corroborated by that of at least two independent witnesses, reputable citizens of Edmonton, whose word I can see no reason to doubt. Apart from this there is not much dispute about the facts. The defendant and every witness who speaks on the subject describe his speed as being slow. There is no one witness who even suggests his rate of speed as being unreasonable except, of course, that the plaintiff and his two witnesses by inference suggest it by their allegation that the car travelled the width of 3rd Street after the impact before it was stopped. The evidence as to the sounding of the horn is as usual unsatisfactory and inconclusive. But all of the witnesses who speak of it, including the plaintiff himself, agree upon this that the plaintiff, who was crossing from the south to the north side of Jasper avenue, at this point was stopped by a street car travelling east on the southerly track, that when standing close to this passing car he either turned and walked back or stepped back without turning, a distance of between 4 and 8 feet, towards the south side of the street from which he had just come, and that in so doing he got directly in front of the defendant's car which knocked him down before the defendant had any chance to stop it or divert its course so as to avoid him. This act of the plaintiff in thus stepping back was undoubtedly the act which caused the injuries of which he complains, for if he had not done this he would not have been hit. It does not appear from the evidence whether or not the plaintiff looked towards the west, from which direction traffic on the south side of the avenue comes, before stepping back. If he did he must have seen the defendant's car then practically up to him and his stepping in front of it was a negligent act. If he did not look he was negligent in not doing so. Pedestrians who are making use of that portion of a public highway over which wheeled traffic must proceed, owe to themselves at least the duty of being careful, and if they are remiss in the performance of that duty and harm comes to them as a result, they should not be heard to complain. I see

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no difference between what the plaintiff here admittedly did and the act of a man who, standing on the curb, suddenly and without warning and without looking, or if after looking, without caring, darts in front of an approaching car. The defendant who saw the plaintiff leave the sidewalk and stop to let the street car pass had every reason to think that he would stand where he was until the street car had passed and would then resume his journey across the avenue, and had no reason to think that he would step back, as he did, in the direction from which he had just come. It is sufficiently clear from the evidence that there was no need for him to do this to avoid injury from the passing street car, for while he was close to he was quite clear of it. And being of the opinion that he, by his negligence, brought this accident upon himself, I would allow the appeal with costs and dismiss the action with costs. This does not involve me in any difference of opinion with the learned trial Judge upon the facts, for as I have pointed out, there is no dispute in the main though there may be in small details with respect to the facts which are necessary to the determination of this question of contributory negligence. I simply reach a conclusion as to the rights and liabilities of the parties upon those facts which is different from that at which he arrived.

*Appeal allowed.*

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SASK.
S. C.

## IMPERIAL ELEVATOR v. HILLMAN.

*Saskatchewan Supreme Court, Haultain, C.J., Lamont, Brown and Elwood, JJ. March 20, 1915.*

1. ESTOPPEL (§ III E—70)—CONDUCT—LEADING TO BELIEF THAT AGENT APPOINTED — NO AGENT APPOINTED — ESTOPPEL FROM DISPUTING AGENCY.

Where one has so acted as from his conduct to lead another to believe that he has appointed someone to act as his agent, and knows that that other person is about to act on that behalf, then, unless he interposes, he will, in general, be estopped from disputing the agency, though in fact no agency really existed.

[*Pole* v. *Leask*, 33 L.J. Ch. 161, followed.]

Statement

APPEAL from the judgment of Newlands, J.

*J. F. Frame*, K.C., for appellant.

*J. A. Allan*, K.C., for respondent.

Brown, J.

BROWN, J.:—This is an appeal from the judgment of my brother Newlands.

In the spring or early summer of 1913, one Chotem, being desirous of going into the hotel business, seems, after some investigation to have decided that the village of Limerick would be a suitable place in which to start up. There was already an hotel at Limerick called the Marshall House, and owned by one Marshall, of Moose Jaw. Chotem had in view the possible purchase of this hotel from Marshall, and he had also arranged for the purchase of certain vacant lots in Limerick from one Rothstein with the idea of building an hotel thereon in case he failed to deal with Marshall. As Chotem and the defendant were both of the Hebrew race, they appear to have become well acquainted, Chotem frequently calling at the defendant's place of business and discussing his plans with the defendant. The defendant, being in the wholesale liquor business himself, evinced an interest in Chotem's venture. It would appear that Chotem feared either that he could not secure, or, having secured, could not hope to retain, a liquor license, on account of some marriage difficulty, and asked the defendant to apply for the liquor license in his (the defendant's) name, stating by way of inducement that he, Chotem, would purchase his liquors from the defendant. This the defendant agreed to. On July 21, with the object of carrying this arrangement into effect, they went to a solicitor's office and had certain documents prepared, all of which were dated as of that date. One of these documents was an agreement of sale between Rothstein and Chotem for the purchase of the vacant lots in Limerick from Rothstein above referred to. This agreement was not executed until July 23, as referred to hereafter.

In this agreement Chotem is described as of Limerick—indicating an intention on his part to the knowledge of the defendant to thereafter live at Limerick. Another of the documents was a lease between Chotem and the defendant of these lots, covering a term of three years, and calling for a rental of $50 per month. The third document was a petition in the usual form for a liquor license. This petition was executed by the defendant, and in it the defendant states that he is applying for a license to sell liquors in the building occupied by him on the lots in question, the building to be known as "The Saskatchewan

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Hotel." He further states that he is the true owner of the business for which the application is made, and that he is the lessee of the premises. In accordance with the requirements in such case, the defendant makes oath that the statements made in his petition are true. This petition was afterwards filed with the Liquor License Department, the same being received by that Department on July 22. The petition came up for the consideration of the License Commissioners in the usual manner at a subsequent date. On July 22, Chotem and the defendant autoed to Limerick. On their way they called at Moose Jaw in order to get Marshall, the owner of the Marshall Hotel, to go with them. Having secured Marshall, they reached Limerick on the morning of July 23. The defendant says that his sole object in going to Limerick on this occasion was to assist Chotem in the purchase of the Marshall Hotel, to give him an idea of what it was worth, etc. Upon arrival an inspection was made of the Marshall Hotel, but the defendant was of the opinion that the price asked for same was much too high, and so advised Chotem. The defendant states that they then consulted with Mr. Giles, the manager of the plaintiff company (which was the only lumber company doing business at Limerick at that time), and also with one Dickinson, a contractor there, and endeavoured to secure from these gentlemen an estimate of what the Marshall Hotel or one like it would cost. He states that they were not prepared to give an estimate at that time, but promised to send same by mail to Regina. The defendant admits that a few days after this the estimate reached him at Regina, and that he handed it over to Chotem, and says that so far as he was concerned he had nothing more to do with the matter. The defendant's evidence as to what took place at Limerick is in direct conflict with that of a number of witnesses, and some of them, apparently, very credible witnesses. The trial Judge evidently wholly disbelieved the defendant's evidence in this respect. Chotem's version of the whole transaction is quite the contrary of the defendant's; but it would appear that the trial Judge, not having much faith in the testimony of either Chotem or the defendant, gave the defendant the benefit of the doubt where there was any conflict between them. We must therefore look to the evidence of other

witnesses, whom the trial Judge evidently believed, to ascertain what took place at Limerick, and as these representations are very important to the case, I quote from the evidence as I find it in the Appeal Book:—

Examination of Thomas B. Giles: Q. In any event Chotem introduced you to Hillman? A. To Mr. Hillman, yes, sir. Q. When Chotem introduced you to Hillman what did he say? A. He said, "This is the gentleman that is going to build a hotel here." Q. To whom did he refer then? A. He was introducing me to Mr. Hillman. Q. When he said this was the gentleman who was going to build a hotel, who was he talking about, do you know? A. He was speaking of Mr. Hillman, giving me an introduction to Mr. Hillman. Q. And he introduced Mr. Hillman as the gentleman who was going to build an hotel? A. Build a hotel yes, sir. Q. Did you know where that hotel was going to be built? A. Yes, on corner lots belonging to Rothsteins. Q. How did you know that? A. Well, Mr. Rothstein was going to build there one time. Q. How did you know Mr. Hillman was going to build there? A. Mr. Rothstein came over, I think the day before, and told me he had a man from Regina who was going to build it. Q. Hillman was introduced as the man who was going to build the hotel? A. Yes, sir. Q. After Chotem introduced Hillman, what did he do? A. The contractor was standing there, or came over about that time, and we went into Mr. Rothstein's store and drew a plan on a paper, just a rough sketch. Q. What kind of an hotel did you——? A. Mr. Hillman said he wanted to build a two-storey hotel if he could get enough rooms in to comply with the License Law, and the contractor, he drew out the sketch on the paper, and they found they could not get enough rooms in a two storey building. Q. So what did they do then? A. Figured out a three storey building. Q. Who was doing all the figuring at that time? A. Mr. Hillman and Mr. Dickinson. Q. What was Chotem doing? A. He was just standing around. He was not interested. Q. How long did they figure there? A. Oh, for quite a few minutes there. Q. And what conclusion did you ultimately arrive at? A. He wanted us to give him a figure on that. Said he could not stay in Limerick only a few hours. He wanted the contractor and myself to give him an estimate of what the cost of a building like that would be. Q. Like what? A. The plan they had figured out, the rough sketch they had drawn out. And of course we told them we could not give an estimate on the building on that short notice. Q. And what arrangement was made? A. The arrangement was made that we were to wire about the rough cost of the building, and construction. Q. Wire whom? A. To Mr. Hillman. Q. And did you do so. A. I didn't, but the contractor told me he did. Q. Before Mr. Hillman left did he come to any arrangement with you as to future business at Limerick? A. In which way? Q. Well, did you get any idea of how this work was going to be managed if you went on with the building? A. Mine was the only lumber yard in town at that time. Q. Yes, but now, did you form any idea as to whether Mr. Hillman was going to come down and put up this building himself or get anybody to do it for him? A. He told me that he could not be down there all the time, that Mr. Chotem would be there practically all the time.

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Q. What was Mr. Chotem going to do? A. He was going to look after the building of the hotel. Q. How did you know that? A. Just by what Mr. Hillman told me. Q. Well, will you tell me what Mr. Hillman told you about this particular matter? A. He said, "I can't be down here all the time, but Mr. Chotem will be here practically all the time." That was, speaking about the building of the hotel.

John H. Dickinson:—

Q. How did you become acquainted with Mr. Hillman? A. Chotem introduced me to Mr. Hillman. Q. Where? A. On the street at Limerick. Q. How did he introduce him? A. Well, he took me over to where Mr. Hillman was standing, and told Mr. Hillman I was a contractor at Limerick, and told me Mr. Hillman came here with the intention of building a hotel, and asked me to talk the matter over with him. Q. What did Mr. Hillman say to that? A. Well, he verified the fact by stating so himself. Q. What did he say? A. He said, "I intend to build a hotel if I make the proper arrangements if it would not cost too much money." Q. Was there any site indicated for that purpose? A. Yes, sir. Q. What was the site? A. The site was on the corner of the main street, I think, and Railway avenue. In fact it was right in front of where he was standing. Q. Did you know then the site? A. Yes, he mentioned it. Q. That is he mentioned he intended building an hotel on that site where you were standing? A. Yes. Q. It was owned at that time by whom? A. Well, I don't know. I don't know who owned it at that time, but Rothstein was understood to have been the owner previously, at any rate. Q. That is the property on which you afterwards did erect a building? A. Yes. Q. What did you do after he said he intended to put up an hotel there? What did he do about making proper arrangements? A. Well, after he told me what he wanted —he would like to build a two-storey hotel if he could get the rooms necessary under the License Act to make the hotel satisfactory for a license. We went to Mr. Rothstein's store, and we took some wrapping paper off the counter there and tried to make a rough sketch that would cover his ideas of a two storey building, and found it would be impossible to get the number of rooms in that; and after talking awhile he said, well, he was in a hurry to get away to Regina again, and that perhaps we had better make an estimate on a three storey building, leave two out of consideration altogether. Q. Yes? A. We talked perhaps about half an hour about the hotel building altogether, and during his conversation there he told me it was altogether likely he would not be back again, at least not very often anyway, during the course of the construction of this building. Q. Any arrangements made as to the superintendence of the building? A. Yes; Mr. Chotem was standing there and he turned around and pointed to Mr. Chotem and told him, Mr. Chotem, would be his agent at Limerick, and he would transact all business for him, because he knew he would not have any time to spend up there, and that anything Mr. Chotem done would be done to his interest; he would be the inspector of the building, and come there and live there. Q. He told you that before he left? A. Yes, sir. Q. What arrangements did he have with you as to the estimate? A. He wanted me to wire him an estimate as soon as possible; in fact he wanted it that day; and it was impossible to figure up a building of that

cost in the short time at our disposal. The trades are not all represented there, and I had to send outside to get an estimate, or roughly guess them myself, and I didn't care to do that, so I arranged to wire him the estimate later on. Q. Did you do so? A. I did. Q. When? A. Well, I don't know the exact date, but it was within three or four days of that time, anyway.

After leaving Limerick, the auto party drove to Expanse and saw Rothstein, the owner of the lots above referred to, and it was on this occasion that the agreement for the sale of these lots was executed by Rothstein and Chotem. At that time, Rothstein says, the following conversation took place:—

Q. What talk was there between you and Hillman before the agreement was signed? A. He said, "You needn't be afraid we are not going to build a hotel. That is understood. I came in and I made arrangements with the lumberman and contractor to give me figure on it, and they gave a little sketch pencil drawing, that this is what we figure to build. Q. Hillman told you that? A. Yes. Q. He told you they had made arrangements with the lumberman and contractor and this was what they were going to build? A. Yes. Q. On your property? A. On my property. Q. On the lots covered by the agreement. A. On these lots, yes.

This evidence is in corroboration of the evidence given by Giles and Dickinson above referred to. The defendant, in making those representations, evidently wished to leave the impression that he was the real owner of the intended business, so that there would be no difficulty in securing a license in his name, and Chotem was apparently only too willing to second the defendant's scheme in this respect. In a few days after the visit, Chotem went back to Limerick, and, presuming to act for the defendant, arranged with Dickinson to construct the hotel and ordered and secured building material from the plaintiffs. The plaintiffs furnished this material under the belief that the defendant was the person building the hotel, and that Chotem was his agent for the purpose of superintending the erection of same, and had authority to order from the plaintiffs any material necessary to that end. The trial Judge has made a finding to the above effect, and there is ample evidence to support such finding. The plaintiffs continued to supply material under this belief until August 31, when the defendant sent a wire repudiating all liability in the matter. Certain telegrams, letters and documents had been sent to the defendant from time to time, some of which he received and some of which he denied ever

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receiving or knowing anything about. Those that he admitted receiving he stated he handed over to Chotem as being the only person who was interested. Certain telegrams were sent to the plaintiffs purporting to come from Hillman, and which apparently, at least to some extent, influenced the plaintiffs in supplying the material. These telegrams were sent by Chotem, who signed the defendant's name to them. Chotem says he had the defendant's authority to do so, but the defendant denies such authority, and states that he did not know anything about them. The defendant states that at no time up to August 30 did he know that Chotem was using his name in the matter at all or that any material was being furnished on his (the defendant's credit). It is, however, very clear from the evidence that the defendant knew that Chotem was at Limerick erecting the hotel, and that the plaintiffs were furnishing material for the same. The learned trial Judge, in his findings of fact, states as follows:—

> I would find as a fact that Hillman never intended to build an hotel at Limerick, nor did he intend to appoint this Chotem his agent, but I would find from the evidence that he acted in such a manner as to lead the plaintiffs to believe he did intend to build a hotel there and did intend to appoint Chotem his agent, and that on that they supplied the materials.

This finding is in effect—and I think the evidence more than justifies it—that although the defendant never had any intention of building an hotel or of appointing Chotem his agent for that purpose, yet he led the plaintiff to believe that he intended both. It should also be stated that both Giles and Dickinson went bondsmen for the defendant in connection with his liquor license application, the bond deed having been signed by them on July 23, during the defendant's visit to Limerick.

The result of the evidence, in the light of the findings of the learned trial Judge, is briefly as follows:—

The defendant represents that he is the party applying for a license for an hotel to be built on these certain Rothstein lots in Limerick; he represents that he is the man who is going to build the hotel for which he has so applied for a license; he represents that Chotem will be his agent at Limerick for the purpose of erecting same; he consults with the plaintiffs as to the material to be furnished for this hotel which he so contem-

plates building. When making these statements and representations he knows, according to his own evidence, that Chotem is going to build this hotel, because he states that he knew before leaving Regina that Chotem intended building on these lots if he (Chotem) failed to secure the Marshall Hotel. He knows that Chotem, within a few days after these representations are made, is proceeding with the erection of this very hotel which he said he was going to build, and for which Chotem was to be his agent. He knows that Chotem is getting material from the plaintiffs, with whom he consulted as to material. He, by virtue of his representations, put Chotem in a position where Chotem could presume to act for the defendant. He knew, or ought to know, that the plaintiffs are probably supplying the material on his credit and in the belief that the hotel is being erected for him. He takes no steps whatever until August 31 to correct any impressions that he may have made.

The plaintiffs, under such circumstances, had a right to infer, as they did infer, that the hotel which was being constructed was the defendant's hotel, that Chotem was his agent, and had authority to secure the material from the plaintiffs for the purpose of its construction. Such inference is, in my opinion, the natural, reasonable, and only logical inference to be drawn. The fact that the plaintiffs on August 16 took steps to get the defendant's signature to a written contract which was never signed, does not, in my opinion, prejudice their position. On the contrary, it rather strengthens it, as it shews that they were taking reasonable precautions to protect themselves in the matter. No more, in my opinion, is their position prejudiced because they relied on the forged telegram of August 19 as being genuine. That telegram was only one, though an important factor, in the whole transaction. The real grievance lies in the fact, as found by the trial Judge, that the defendant's actions were such all through as to lead the plaintiffs to believe that he was the party doing the business.

The agency which the trial Judge finds is apparently agency by estoppel. In this connection Bowen, L.J., in *Low* v. *Bouverie*, [1891] 3 Ch. 82, at 106, says:—

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Now, an estoppel, that is to say, the language upon which the estoppel is founded, must be precise and unambiguous. That does not necessarily mean that the language must be such that it cannot possibly be open to different constructions, but that it must be such as will be reasonably understood in a particular sense by the person to whom it is addressed.

See also 13 Hals., p. 379.

It is not necessary that the representation should be false to the knowledge of the party making it, provided that the person who makes it so conducts himself that a reasonable man would take the representation to be true and believe that it was made that he should act upon it in the manner in which it was acted upon: *Freeman* v. *Cooke*, 2 Ex. 654; *McKenzie* v. *British Linen Co.*, 6 App. Cas. 82, 13 Hals., p. 382.

In *Pole* v. *Leask*, 33 L.J. Ch. 155, Lord Cranworth, at 161, says:—

No one can become the agent of another person except by the will of that other person. His will may be manifested in writing or orally, or simply by placing another in a situation in which, according to ordinary rules of law, or perhaps it would be more correct to say, according to the ordinary usages of mankind, that other is understood to represent and act for the person who has so placed him; but in every case it is only by the will of the employer that an agency can be created.

This proposition, however, is not at variance with the doctrine that where one has so acted as from his conduct to lead another to believe that he has appointed someone to act as his agent, and knows that that other person is about to act on that behalf, then, unless he interposes, he will, in general, be estopped from disputing the agency, though in fact no agency really existed.

The pleadings in this case allege agency on the part of Chotem, but do not allege agency by estoppel. Counsel at the close of the trial asked to have the pleadings amended in this respect. The trial Judge did not apparently deal with the matter, and, I infer, did not consider such amendment necessary. If the defendant's liability arises out of the fact that Chotem was his agent by estoppel—and I am of opinion that such is the case—then agency by estoppel should be pleaded: *Mackenzie* v. *Gray & Sons*, 17 D.L.R. 769; *Hayes* v. *Wilson*, 20 D.L.R. 569.

At the argument before us, counsel for the plaintiffs renewed the application to amend. I am of opinion that such amendment should be allowed.

In *Boyle* v. *Grassick*, 2 W.L.R. at p. 286, Wetmore, J., in

giving the judgment of the Full Court of the North-West Territories, says—

There is no doubt that this Court has, by virtue of Rule 507 of the Judicature Ordinance, power to make the amendment asked for, and by virtue of rule 178 it ought to do so if it is necessary for the purpose of determining the real questions in controversy between the parties. Now, the real question in controversy between the parties here is, as I have stated, whether or not the plaintiffs are entitled to recover compensation for their services in connection with obtaining a purchaser for these lots. In my opinion, therefore, the amendment ought to be allowed, because it is questionable whether the plaintiffs were entitled to recover under the statement of claim as originally framed. In fact it is conceded that they were not entitled to recover under it, and that if entitled to recover at all it must be upon an alternative paragraph as set forth in the amendment.*

In the case at bar the main question was that of agency on the part of Chotem, and the defendant's conduct and representations were gone into at great length by both sides in endeavouring to solve that question. The trial Judge has found that the defendant's conduct and representations did not constitute agency in fact, but that they did constitute agency by way of estoppel. I do not think it can be said that the plaintiffs' counsel were at fault under the circumstances of this case in pleading as they did. There were good reasons for considering that there was a case of actual agency. I am unable to see in what way any injustice will be done the defendant by allowing the amendment, and, as great injustice would be done the plaintiffs by not allowing it, I am of opinion that the amendment should be made as asked for.

The appeal, therefore, should, in my opinion, be dismissed with costs.

HAULTAIN, C.J., and LAMONT, J., concurred with BROWN, J.

Haultain, C.J.
Lamont, J.

ELWOOD, J., dissented.

Elwood, J. (dissenting)

*Appeal dismissed.*

[*The above quotation differs materially from the judgment of Wetmore, J., in the same case reported in 6 Terr. L.R. 232.]

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## McDERMOTT v. FRASER.

*Manitoba King's Bench, Curran, J. March* 18, 1915.

1. LANDLORD AND TENANT (§ III D 3—110)—DISTRESS—SEIZURE OF GOODS—COSTS—STATUTORY COMPLIANCE.

Under the Distress Act, R.S.M., 1913, ch. 55, a party distraining is to give a copy of demand and of all costs and charges of the distress to the person whose goods are seized, but failure to comply with this statutory provision does not make the distress illegal, although it may render irregular the sale of the goods distrained.

[*Vaughan* v. *Building and Loan Assn.*, 6 Man. L.R. 289, referred to.]

2. CHATTEL MORTGAGE (§ IV A—40)—RIGHTS OF PARTIES—RIGHT TO DISTRESS—ARREARS.

Where a mortgage of land contains an attornment clause whereby the mortgagor becomes the tenant of the mortgagee at a yearly rent equivalent to the annual interest, the mortgagee has a right of distress in like manner as a landlord for interest in arrear, and this right may be exercised under the Distress Act, R.S.M., 1913, ch. 55, sec. 5, as against a chattel mortgagee of the goods distrained.

3. MORTGAGE (§ VI B—75)—ENFORCEMENT—DEFAULTS — RIGHT TO DISTRESS—GOODS OF OTHER PERSONS.

Where a land mortgage contains an attornment clause in respect of the interest and in addition purports to give the mortgagee the right to distrain upon any goods upon the mortgaged premises for arrears of principal and to recover same by way of rent reserved, a mere personal license is created by the latter power as between the mortgagor and the mortgagee, which does not justify the mortgagee distraining goods of persons other than the mortgagor which may be upon the premises.

[*Edmonds* v. *Hamilton Provident*, 18 A.R. (Ont.) 347; *Miller* v. *Imperial Land Co.*, 11 Man. L.R. 247; *Trust & Loan Co.* v. *Lawrason*, 10 Can. S.C.R. 679, applied.]

4. CHATTEL MORTGAGE (§ II D—25)—ABSENCE OF DEFEASANCE CLAUSE—POSSESSION IN MORTGAGEE.

The right of possession is an incident to the right of property in the goods, and, where a chattel mortgage vests the right of property in the chattel mortgagee and there is no defeasance clause or other stipulation to the contrary, the chattel mortgagee becomes entitled to the possession.

[*Smith* v. *Fair*, 11 A.R. (Ont.) 755, referred to.]

5. CHATTEL MORTGAGE (§ IV B—45)—PRIORITIES—CREDITORS.

The expression "creditor" in sec. 5 of the Chattel Mortgage Act, Man., declaring that a mortgage of goods not accompanied by immediate delivery and an actual and continued change of possession and not registered shall be void as against "the creditors of the mortgagor and as against subsequent purchasers and mortgagees in good faith," means an execution creditor or a judgment creditor, *i.e.*, one who is in a position to assert and exercise a present right to take possession of the goods.

[Barron on Chattel Mortgages, 2nd revised edition, 501, referred to.]

6. CHATTEL MORTGAGE (§ VI—55)—ENFORCEMENT—RIGHT TO DISTRESS.

Where the land mortgagee having a right to distrain for rent to the amount of the interest overdue under the terms of his mortgage,

includes in his distress not only such interest but an instalment of principal money for which he had the authority of a mere personal license from the mortgagor, the distress is not thereby vitiated *in toto* as to a chattel mortgagee; the inclusion of the principal money is irregularity only, and will not prevent the distress being upheld for the amount of the interest rental.

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Statement

ACTION for delivery up of goods and for damages for wrongful distress.

*G. A. Eakins*, for plaintiff.

*H. F. Maulson*, for defendant.

Curran, J.

CURRAN, J.:—The plaintiff is a mortgagee of the goods and chattels mentioned in the statement of claim under a mortgage, ex. 2, given by one George Young, dated December 12, 1914, registered in the County Court of Minnedosa at 11.15 a.m., on December 14, 1914, securing $1,305.84 with interest at 10 per cent. payable on December 12, 1915.

It appears in evidence that the plaintiff held a prior chattel mortgage on these goods or some of them from the same party which was not renewed as required by the Chattel Mortgage Act, and ex. 2 was taken to replace such expired or unrenewed chattel mortgage, and to secure the same debt with accrued interest. The chattel mortgage contains no redemise of the goods to the mortgagor.

The defendant is a second mortgagee, under ex. 3, of the east half and north west quarter of section 25, township 15, range 18 west of the first principal meridian in the Province of Manitoba; the mortgagor being the same George Young who is the mortgagor in ex. 2, and the goods and chattels covered by the plaintiff's mortgage were situate on the above land and were there distrained by the defendant.

The title to the land is under the old system of registration and the defendant's mortgage purports to be made in pursuance of the Act respecting Short Forms of Indentures, ch. 181, R.S.M. 1913. It secures $7,563, and is dated December 21, 1913, and registered on January, 2, 1914, in the proper registry office in that behalf, conditioned for payment as follows:—

$300 to become due and payable on December 1, in each of the following years, A.D. 1914, 1915, 1916 and 1917, and the balance to become due and payable on December 1, A.D. 1918, with interest yearly at eight per cent. on December 1, in each year on the unpaid principal.

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The first payment of interest became due therefore on December 1, 1914, at which date an instalment of principal, $300, also fell due. Neither of these sums were paid and default as to both existed at the date of the seizures complained of. This mortgage, ex. 3, contained an attornment clause in these words:—

> And for the purpose of better securing the punctual payment of the interest on the said principal sum the mortgagor doth hereby attorn tenant to the mortgagee for the said lands at a yearly rental equivalent to the annual interest secured hereby to be paid yearly on each 1st day of December, the legal relation of landlord and tenant being hereby constituted between the mortgagee and mortgagor.

It also contained the statutory proviso found in the Short Forms Act, permitting the mortgagee to distrain for arrears of interest; and in addition the clause following, relating to principal:—

> And further, that if default should be made in payment of any part of the said principal at any day or time hereinbefore limited for the payment thereof, it shall and may be lawful for the mortgagee and the mortgagor doth hereby grant full power and license to the mortgagee to enter, seize and distrain upon any goods upon the said lands or any part thereof and by distress warrant to recover by way of rent reserved as in the case of a demise of the said lands as much of such principal as shall from time to time be or remain in arrear or unpaid, together with all costs, charges and expenses attending such levy or distress as in the case of distress for rent.

This mortgage contains no redemise clause. The mortgagor was, strictly speaking, entitled to remain in possession only in virtue of the attornment clause although an intention to this effect might well be presumed from other provisos in the mortgage.

The mortgage is not executed by the mortgagee.

On December 12, 1914, the defendant asked the mortgagor for money on account of what was owing upon this mortgage, when the mortgagor claimed he could not pay the defendant anything. There was then due for principal $300 and for interest $570.20. Accordingly on December 12, 1914, the defendant issued the distress warrant, ex. 5, and placed it in the hands of his bailiff Burland, therein named, for execution. This warrant authorizes the levy of the gross sum of $870.20, particularized in the warrant as "being $570.20 rent and $300 principal by virtue of a certain mortgage dated the 21st day of December,

1913, being one year's rent due on December 1, 1914," and requires the bailiff—

for the purpose aforesaid to distrain within the time, in the manner and with the forms prescribed by law all such goods and chattels of the said George Young, wheresoever they shall be found, as have been carried off the premises but nevertheless liable by law to be seized for the rent aforesaid (and to) proceed thereupon for the recovery of the said rent as the law directs.

The bailiff Burland went out to the farm in question early on Monday morning of December 14, 1914, arriving there about 8 o'clock, when he claims to have made a seizure of all the goods and chattels on the farm except the household goods, which he was instructed not to seize, and at the same time, he says he exhibited to the mortgagor George Young his distress warrant and handed him a copy of the notice of distress, ex. 6.

No inventory of the goods seized or purported to be seized had then been prepared. Burland says the inventory was made partly on December 14, and completed on the morning of December 15, when a copy of same was handed to Young, ex. 7. Burland remained at the farm from the morning of December 14, until 4 or 5 o'clock on the afternoon of December 15, when he left the premises, having put a man in possession. The goods were advertised to be sold on December 22, 1914. The plaintiff, on learning of the alleged seizure, caused the notice, ex. 4, to be served on the bailiff on the afternoon of December 14.

The bailiff admits that he did not make any demand on the tenant for rent or for payment of the $870.20 before making the seizure. There was no manual interference with any of the chattels purported to be seized, either on the 14th or 15th of December, nor were any goods removed off the premises, nor were the horses and cattle purported to be seized, rounded up and put in a separate place on the premises, nor was any act done to ear-mark the property seized. In fact nothing at all was done by the bailiff on December 14, beyond declaring that everything on the place was seized except the household goods and preparing a list of the chattels from knowledge gained by walking about the farm.

The plaintiff on December 21, 1914, issued his statement of claim and obtained a replevin order for the goods named in

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the chattel mortgage, which was executed by the sheriff on December 22. The goods were thereupon handed over to the plaintiff and have ever since been in his possession.

The plaintiff alleges that the seizure was wholly wrongful and illegal and asks for delivery up of the goods to him and for damages for wrongful distress. The defendant justifies his seizure under the attornment clause in his mortgage and the other clauses I have referred to permitting a seizure for arrears of principal. He also claims that his seizure was actually made and in force before the plaintiff's chattel mortgage was registered.

By sec. 9 of the Chattel Mortgage Act, ch. 17, R.S.M. 1913, a mortgage of goods given under the provisions of the Act is only operative, except as between the parties, from and after the day and time of registration. For this reason it is contended by the parties that it is necessary for me to determine the time when the seizure was actually made.

The plaintiff contends that no legal seizure was made until December 15, whereas the defendant contends that such a seizure was made on the morning of December 14, before the plaintiff's chattel mortgage was registered.

Some of the facts alleged by the bailiff in connection with the alleged seizure are denied by Young and his wife, witnesses for the plaintiff. However, I am inclined in the main to accept the bailiff's evidence as to what he did, except as to the alleged service of the notice of distress, ex. 6. I do not believe any such notice was served until after the inventory of the goods was made and admittedly this was not until the morning of the 15th.

What are the requisites of a valid distress? The only statutory enactment in this Province germane to the subject is the Distress Act, ch. 55, R.S.M. 1913, sec. 6 of which requires the party making a distress to give a copy of demand and of all costs and charges of the distress, signed by him to the person whose goods are seized. This requirement was not complied with. At common law a demand of rent was necessary before an entry or ejectment could be maintained for non-payment of rent, and the demand should be for the exact rent payable.

There need not be an actual seizure of the property dis-

trained on, any expression of intention to distrain being sufficient: Woodfall on Landlord and Tenant, 13th Eng. ed. 726; Bell on Landlord and Tenant, 322 and 323.

After the goods have been distrained they should be impounded and an inventory made, a notice in writing should be given to the tenant of the fact of the distress having been made and the time when the rent and charges must be paid or the goods replevied. A true copy of the inventory and notice should be served upon the tenant personally or left at his house and certainly a copy of demand required by section 6 of the Distress Act should have been given. Exs. 6 and 7 were apparently given to meet these requirements, and I think they did so, except as to notifying the tenant of the charges to be paid. However, I think these proceedings are required in the interest of the tenant and for his protection: *Vaughan* v. *Building and Loan Association*, 6 Man. L.R. 289 at 291. Are they essentials to the validity of the distress? I do not think so. Failure to comply with them renders the sale of the goods distrained irregular, but does not make the distress illegal: *Tren* v. *Hunt*, 9 Ex. 14. It may render the landlord liable to an action under certain circumstances, but for the purpose of the present inquiry all I have to determine is: was there a legal distress made, and when? I think there was, and it was made on the morning of December 14, before the plaintiff's chattel mortgage was registered.

Now, under the foregoing circumstances, what were the rights of the parties? I think beyond any doubt the attornment clause in the defendant's mortgage was valid and that the legal relation of landlord and tenant was thereby created. The yearly rent reserved was a sum equivalent to the annual interest secured by the mortgage, a sum considerably less than the fair rental value of the premises, which was stated by the tenant himself to be $3 an acre for the cultivated land, some 240 acres, in extent, or about $720 a year, whereas the yearly interest amounted to but $605. $570.20 became due for interest on December 1, 1914, and for this sum as rent reserved I think the defendant had a legal right to distrain upon any goods and chattels found on the demised premises, subject to the restric-

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tions imposed by the Distress Act: *Linstead* v. *Hamilton Provident & Loan Society*, 11 Man. L.R. 199.

That case decided that sec. 2 of the then Distress Act, identical in language with sec. 2 of the Act now in force, ch. 46, R.S.M., has no reference to the right of mortgagees to distrain for rent under a tenancy validly created but only to the right to distrain for interest as such provided for in the ordinary distress clause in the Act respecting Short Forms of Indentures.

If the defendant had contented himself with distraining for interest alone, there would be no difficulty in reaching a conclusion, but he has seen fit to incorporate in his distress so made, a claim for principal money, $300, in addition to what he could rightfully call rent and for which as such he had an undoubted right to distrain.

The clause in the mortgage which I have referred to and set out in full purports to give the defendant the right, as between himself and the mortgagor, to enter, seize and distrain upon any goods upon the mortgage premises for principal money in arrear and by distress warrant to recover by way of rent reserved as in the case of a demise of the lands.

Sec. 2 of the Distress Act applies only to interest, and the right to distrain for interest given by the statutory distress clause under the Short Forms Act has been held to be merely a personal license, not justifying the mortgagee in distraining any goods other than those of the mortgagor: *Trust & Loan* v. *Lawrason*, 10 Can. S.C.R. 679, and same has been held with regard to the right to distrain for principal money: *Edmonds* v. *Hamilton Provident & Loan Society*, 18 A.R. (Ont.) 347, *per* Osler, J.A. If then the goods distrained were not the goods of the mortgagor the distress of same for overdue principal money was clearly illegal. Sec. 5 of the Distress Act provides that a landlord shall not distrain for rent on goods and chattels, the property of any person except the tenant or person who is liable for the rent, although the same are found on the premises; but this restriction shall not apply in favour of any person whose title to the goods is derived by way of mortgage, etc. So that a distress for rent could lawfully be made on goods, the subject of the plaintiff's chattel mortgage. Could it lawfully be made

on such goods for principal money also? Clearly not, if the goods were not the goods of the mortgagor: *Miller* v. *Imperial Loan Co.*, 11 Man. L.R. 247.

Now, as before remarked, the plaintiff's chattel mortgage contains no reclamise of the goods or any clause permitting the mortgagor to retain possession until default: Barron on Chattel Mortgages, 2nd revised edition, p. 88, contains this statement of the law, which I think applicable to the plaintiff's chattel mortgage:—

> The law has generally been conceded to be that when there is an absolute conveyance from mortgagor to mortgagee, then a defeasance on a certain event, then a provision that the mortgagor will forever warrant and defend the goods unto the mortgagee, then a declaration that the mortgagor doth put the mortgagee in possession of the goods by delivery of something, that the possession follows the property conveyed, and the mortgagee, though no default has been made, is entitled in law to exercise possession at any time. (And again, at p. 89): The right of possession is an incident to the right of property and the right of property being vested in the mortgagee by the conveyance, he becomes entitled to the possession in the absence of stipulations to the contrary.

See also *Smith* v. *Fair*, 11 A.R. (Ont.) 755, at 764.

Upon this state of the law I should have little difficulty in deciding that the goods in question were the property of the plaintiff and not of the mortgagor Young when the distress was made, were it not for the provisions of our Chattel Mortgage Act. Sec. 5 provides that every mortgage of goods which is not accompanied by immediate delivery and an actual and continued change of possession shall be registered, etc., otherwise such mortgage shall be absolutely null and void as against the creditors of the mortgagor and as against subsequent purchasers or mortgagees in good faith, etc. Sec. 9, as before stated, provides that a chattel mortgage shall take effect, except as between the parties thereto, only from and after the day and time of registration. If the defendant is a "creditor" within the meaning of sec. 5, his claim sought to be enforced by distress of the goods mentioned in the plaintiff's chattel mortgage made before the registration of the chattel mortgage would, I think, give him priority over the plaintiff's rights not then perfected by registration. The interpretation clause in the Act does not help very much. It merely states that the expression "creditor" extends

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to and includes any assignee for the general benefit of the creditors of the mortgagor. It seems to me, however, that the expression "creditor" means an execution creditor or a judgment creditor, one who is in a position to assert and exercise a present right to take possession of the goods: Barron, at p. 501, says:—

> Should any one, without title or otherwise than in the character of a creditor, purchaser or mortgagee, in good faith, take possession of the property mortgaged or sold, the mortgagee or bargainee would be entitled to an action of replevin or trespass against any such person.

Now, how could a creditor take possession of the goods except by process of law, which presupposes a judgment obtained and execution sued out, under which alone could the goods be seized or attached. In this case the chattel mortgage was registered without delay. The statute has been complied with; It is not contended that the mortgage is fraudulent or that the plaintiff's claim is not *bonâ fide*. The plaintiff did all he could to secure prompt registration, and is he to be deprived of his rights merely because the defendant having a bare personal license to distrain the mortgagor's goods seizes the chattel mortgage property before it was possible for the plaintiff to register his chattel mortgage. It seems to me to permit this would be wholly inequitable. The plaintiff stands to lose all, the defendant, nothing except the present realization of his small overdue instalment of principal. He has the land to answer his mortgage debt. The plaintiff, if he loses his remedy against these goods loses everything. The equities of the case, so far as the defendant's right to collect his overdue principal is concerned, are, I think, wholly with the plaintiff, and I ought not to be astute to find reasons in law to deprive him of the little security that remains to him under the circumstances.

I hold, then, not without some doubt, that the goods named in the plaintiff's chattel mortgage were at the time of the seizure under the defendant's distress the property of the plaintiff and not of the mortgagor, and so were not liable to distress for principal money under the defendant's mortgage; that the defendant's right of distress is confined to the overdue interest and does not extend to the overdue principal.

It makes no difference to the plaintiff that the defendant has

improperly included in his distress principal money as well as rent. There was rent due for which the right of distress existed. The inclusion of the principal money constituted an irregularity only and did not vitiate the distress *in toto*. I hold, therefore, that the defendant's distress for the interest *qua* rent, $570.20, is lawful, but that the distress for the $300 of principal money is not lawful but was wrongful.

The plaintiff's main contention that the relation of landlord and tenant had not validly been created between the mortgagor and the defendant, and that therefore the distress was wholly wrongful, fails.

It appeared from the evidence of the bailiff that the sum of $294 was realized from the sale of goods which were not included in the plaintiff's chattel mortgage and were not interfered with by the replevin proceedings. After payment of the costs of distress and sale a substantial sum of this money should remain to the defendant towards paying the overdue principal money. The defendant does not therefore stand to lose much by having his right of distress confined to the collection of interest alone.

The goods will now have to be returned to the defendant to be dealt with as the law directs in cases of distress for rent, that is, by being again advertised and sold at public auction. If, after payment of the rent and costs of sale, there is any surplus, it should be paid over to the plaintiff to be applied on his chattel mortgage.

This is not a case, in my opinion, where the plaintiff should be penalized in costs. The defendant has not succeeded in all his contentions, and taking this fact and all the surrounding circumstances into consideration I think the ends of justice will best be served by dismissing the plaintiff's action without costs, and I so adjudge.

Upon the plaintiff's returning the goods intact to the defendant, the security given by the plaintiff to the sheriff upon the issue of the replevin order will be returned to the plaintiff by the sheriff, if no appeal is taken from my judgment. The plaintiff must lose the expense he has been put to in feeding and caring for the live stock since it was replevied to him.

*Judgment accordingly.*

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## SEIFERT v. SEIFERT.

*Ontario Supreme Court, Middleton, J.*

1. DOMICILE (§ I—4)—CHANGE OF—INTENTION—RESIDENCE WITHIN JURISDICTION OF NEW DOMICILE.

An intention to make an abandonment or change of domicile must be proved by satisfactory evidence; domicile may be changed by the choice of another domicile evidenced by residence within the territorial limits to which the jurisdiction of the new domicile extends.

[*Re Martin*, [1900] P. 211, followed; *Udny* v. *Udny*, L.R. 1 Sc. App. 441; *Huntly* v. *Gaskell*, [1906] A.C. 56; *Winans* v. *Atty.-Gen.*, [1904] A.C. 287, applied.]

2. WILLS (§ II—65)—HOLOGRAPH—REVOCATION—CHANGE OF DOMICILE—TESTATOR'S MARRIAGE.

A holograph will executed in the Province of Quebec becomes revoked as regards its effect in Ontario by the testator's marriage in Ontario after changing his domicile to that province.

3. COURTS (§ I B—10)—PROBATE—HOLOGRAPH WILL EXECUTED IN QUEBEC—NOT JUDICIAL ACT, CONCLUSIVE ON ONTARIO COURT.

The admission to probate by the Superior Court, Quebec, of a holograph will executed in accordance with the laws of that province is not a judicial act conclusive upon an Ontario court in determining the question whether the testator had changed his domicile to Ontario after making such will and by his subsequent marriage in Ontario revoked the holograph will at least as regards property in Ontario; a probate in the Province of Quebec differs from the proof of a will in a Surrogate Court in Ontario, the probate in Quebec being issued as a matter of course upon the filing of a petition and an affidavit shewing the due execution of the will.

Statement

ISSUES arising out of a contestation in a Surrogate Court, transferred to the Supreme Court of Ontario, were ordered to be tried.

*H. H. Dewart*, K.C., and *A. Haydon*, for the plaintiff.

*Travers Lewis*, K.C., for the infant defendants.

*J. A. Ritchie*, for the adult defendants.

Middleton, J.

MIDDLETON, J.:—This matter originated in the Surrogate Court of the County of Carleton, but has been transferred to the Supreme Court of Ontario, and issues have been directed to be tried for the purpose of determining: (1) the domicile of the deceased Gustavus Otto Seifert, at the time of his death on the 4th December, 1913; (2) the domicile of the deceased at the time of his marriage on the 1st June, 1910; (3) whether a certain holograph will, dated the 16th February, 1909, ought to be admitted to probate; and (4) whether the deceased died intestate, and letters of administration should issue to the plaintiff, his widow.

Undoubtedly the domicile of origin of the deceased was the city of Quebec. There his parents resided and his youth was spent. The parents of the deceased resided there for many years and until their death. In his early years Otto Seifert took part in his father's business, and lived with his father. Some 13 or 14 years ago he gave up his interest in his father's business, and about the same time became interested in a steam-laundry business which he established and carried on in the city of Quebec. In 1901, he also started a steam-laundry business in the city of Ottawa. He continued to carry on both businesses until his death. Prior to his marriage, he continuel his home in Quebec, although he was necessarily a good deal at Ottawa in connection with the important business he carried on there.

I do not know that anything would be gained by endeavouring to ascertain the proportion of the time Mr. Seifert spent in one place or the other prior to that event. Suffice it to say that up to a time shortly before the marriage there is nothing from which a change of domicile could be inferred.

On the 1st June, 1910, Mr. Seifert married Miss O'Sullivan. The marriage took place at the city of Ottawa. Miss O'Sullivan had her domicile of origin and residence also at Quebec. She was a Roman Catholic; Mr. Seifert was a Methodist; and it was intended that upon her marriage she should accept her husband's religious faith.

In the Province of Quebec doubt has been raised as to the validity of a marriage of a Roman Catholic and a Protestant. The abandonment by a wife of the Catholic faith is not looked upon with favour. The community in Quebec is largely Catholic. For these reasons, and possibly for other reasons, the wife now says that it was stipulated, and was a condition of her assent to the marriage, that not only should the ceremony take place in Ottawa, but the future home should be there. I see no reason to discredit this statement; in fact, everything points to its accuracy; and, if it is necessary that this statement should be corroborated, I think it is sufficiently corroborated by what took place.

Prior to the marriage, Mr. Seifert leased a furnished house in the city of Ottawa, and added to its furnishings. Miss O'Sul-

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livan came there, and stayed at the house while preparing for her marriage, accompanied by Mr. Seifert's sister; Seifert himself continuing to reside at the hotel where he had stayed while in Ottawa. Upon the marriage taking place, Mr. and Mrs. Seifert resided in this house. Subsequently another house was rented. More lately this house was purchased, and became the Seiferts' home until shortly before his death, when he purchased another residence at Britannia, a suburb of Ottawa. Death came suddenly and unexpectedly on the 4th December, 1913.

Although Mr. Seifert and his wife spent the summer following the marriage in the Province of Quebec, their residence there was temporary and in the nature of a visit; and, apart from this visit, the matrimonial home has always been in Ottawa, in the premises rented and owned by the husband. On several occasions, owing to the condition of Mrs. Seifert's health, she was away from this home for several months; but these absences were of the nature of visits merely. Mr. Seifert was also away from Ottawa and in Quebec on different occasions in connection with the Quebec business; but from the time of the marriage onward there was no difficulty in accepting the view that Ottawa had become his home.

This, however, is not the point of difficulty in the case. The question of domicile at the date of the marriage is the critical and important question.

According to the law of the Province of Quebec, a testator may validly make a holograph will. On the 16th February, 1909, Mr. Seifert, then not having matrimony in view, executed a holograph will, by which substantially all his estate is divided equally between his surviving brothers and sisters. According to the law of Quebec, upon marriage a will is not revoked, but where the marriage takes place, as here, without a marriage settlement, a community of property is established which secures to the surviving spouse a share of the assets of the community. If the matrimonial domicile is the Province of Quebec, then Mrs. Seifert would be entitled to receive, speaking generally, half of her husband's property. If, on the other hand, the domicile was in the Province of Ontario, then marriage would, by virtue of the Ontario law, revoke this will, and the widow and infant

children would take, to the exclusion of the brothers and sisters. The contest is thus between those taking under the holograph will on the one side, and the widow and children on the other; the widow preferring to allege an intestacy instead of a community.

This holograph will has been admitted to probate by the Superior Court of the Province of Quebec. It is admitted by all counsel concerned that this judicial act is not conclusive upon me, as apparently a probate in the Province of Quebec differs widely from the proof of a will before a Surrogate Court in the Province of Ontario; probate issuing there as a matter of course upon the filing of a petition and an affidavit shewing the due execution of the will.

A good many facts were established in evidence, some pointing towards a Quebec domicile, some pointing towards a domicile at Ottawa, e.g., the lease of the Waverly street house immediately before the marriage, in which Seifert is described as of the city of Quebec, in the Province of Quebec; the declaration filed under the Partnership Act on the 25th November, 1902, in which Mr. Seifert is described as of the city of Ottawa, in the county of Carleton; but these appear to me to afford little assistance. Of greater value is the affidavit made for the purpose of obtaining a marriage license, in which Mr. Seifert not only describes himself as of the city of Ottawa, in the county of Carleton, but in which he states that he has had since May, 1902, his usual place of abode within the city of Ottawa. I do not regard this as indicating that Seifert was domiciled at Ottawa from 1902, the time when he established the laundry business there, but it appears to me to go far to confirm the statement that in 1910 he had definitely made up his mind, at a date antecedent to the actual marriage, to claim Ottawa as his usual place of abode; and in this respect the statement made by the wife receives very substantial confirmation.

In attaching this value to the evidence, I have present to my mind the decision of the Supreme Court of Canada in *Wadsworth* v. *McCord* (1886), 12 Can. S.C.R. 466, where it was held that a description attributing residence in an *acte de mariage* has

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only relation to the residence necessary to permit of a marriage lawfully taking place.

Having reached this conclusion upon the facts, it is perhaps unnecessary that I should say anything with reference to the views I take as to the law relating to change of domicile; but I think it better to set forth these views, to shew that the opinion I have expressed has been formed in the light of the decided cases, so that if in any respect I am in error, and if this error has influenced my conclusion, I may be the more readily set right.

In the evolution of the English law relating to the acquisition of a domicile of choice, the distinction between domicile and national allegiance has not always been borne in mind; and, although the English law must now be regarded as well settled, occasionally expressions are found indicating a tendency to revert to the earlier period in which the factor of national allegiance took too prominent a place.

The Scotch case, *Udny* v. *Udny* (1869), L.R. 1 Sc. App. 441, contains still the most authoritative exposition of the law. Domicile of choice is the creation of the party. A man may change his domicile as often as he pleases, without changing his allegiance. To suppose that for a change of domicile there must be a change of national allegiance is to confound the political and the civil status, and to destroy the distinction between *patria* and *domicilium*. The domicile can be changed, as put by Lord Hatherley (p. 449), "by the choice of another domicile, evidenced by residence within the territorial limits to which the jurisdiction of the new domicile extends. He, in making this change, does an act which is more nearly designated by the word 'settling' than by any one word in our language." Lord Westbury states the law in very similar terms (p. 458): "Domicile of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time. This is a description of the circumstances which create or constitute a domicile, and not a definition of the term. There must be a residence freely chosen."

"Domicile" has been described as equivalent to "home"

(Phillimore's International Law, 3rd ed., vol. 4, p. 45). It follows from this that the same principles apply in determining whether there has been a change of domicile when the suggested change is from one sovereignty to another sovereignty, and when the change is from one part to another of the same dominion; but it appears to me that some of the facts relied on in some of the cases possess more cogency when applied to a change which would ordinarily be accompanied by an abandonment of the original allegiance than when the allegiance remains the same. This is particularly so where the fact relied upon is the exercise of the political right of voting.

All the cases point out the facts that the domicile of origin is not to be treated as abandoned upon slight evidence. The onus is clearly upon those asking the Court to determine that a new domicile has been chosen, to satisfy the Court that there has been an actual intention on the part of the individual to abandon his domicile of origin. It is not necessary to multiply citations in support of this. The cases are well collected in the Supreme Court decision already referred to and in the later case of *Jones* v. *City of St. John* (1899), 30 S.C.R. 122.

*Marchioness of Huntly* v. *Gaskell*, [1906] A.C. 56, puts this point clearly: "The abandonment or change of a domicile is a proceeding of a very serious nature, and an intention to make such an abandonment must be proved by satisfactory evidence."

To the same effect is *Winans* v. *Attorney-General*, [1904] A.C. 287.

The view expressed by Lord Westbury has been adopted and followed by Sir W. M. James in *Haldane* v. *Eckford* (1869), L.R. 8 Eq. 631, and by Sir John Wickens in *Douglas* v. *Douglas* (1871), L.R. 12 Eq. 617, and by the Court of Appeal in *In re Grove* (1888), 40 Ch. D. 216.

The latter case is of value here as establishing the proposition that acts, events, and declarations, subsequent to the time at which a domicile arises, are admissible in evidence upon that question, when they indicate what the intention was at a given time.

Applying the law as laid down in all these cases and in many others to which I have referred and carefully read, I have come

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to the conclusion that here the deceased, before his marriage, determined to make his home in the Province of Ontario, and that he elected to change his domicile from Quebec to Ottawa, and that in the renting and furnishing of the house in Ottawa he had given effect to this intention, so that the new domicile was gained *animo et facto*. Ottawa became his home. There he lived with his wife and children. Some evidence was given shewing that Mr. Seifert had entered into negotiations looking towards the purchase of the family house in Quebec. This, I think, does not displace the intention to remain in Ottawa as his permanent home. It may indicate that at the time these inquiries were made there was a half-formed intention to abandon the domicile of choice he had then acquired; but, as nothing came of the overtures then made, there was no abandonment of domicile of choice.

This brings the case precisely within the decision in *In re Martin, Loustalan* v. *Loustalan*, [1900] P. 211.

The provision of the statute of Ontario by which the marriage revoked the will formed part of the matrimonial law, and not of the testamentary law, and operated here to revoke the will executed in the Province of Quebec. This will was valid at the time it was executed, and, for aught I know, it may yet remain valid so far as the Province of Quebec is concerned, for I do not know whether that Court follows the law of domicile in dealing with the administration of the effects of deceased persons; but that question will have to be determined by the Courts of Quebec according to the Quebec law. The case just referred to is also of great value upon the question first discussed.

I therefore find, upon the issues submitted, that at the time of the death of the deceased he was domiciled in the Province of Ontario, and that he became domiciled in Ontario at a time prior to the marriage of the 1st June, 1910; that upon the marriage the holograph will dated the 16th February, 1909, became revoked; and, it not being shewn that any other will was ever executed in accordance with the laws of the Province of Ontario, the deceased died intestate, and the plaintiff, as his widow, is entitled to letters of administration of the estate of the deceased in Ontario.

The costs of all parties may, I think, be paid out of the estate of the deceased. *Judgment accordingly.*

## DeWYNTER v. FULTON.

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*Alberta Supreme Court, Harvey, C.J., Stuart and Beck, JJ. February 16, 1915.*

1. SALE (§ III—57)—SALE OF BUSINESS—MISREPRESENTATION AND WARRANTY—ACTION FOR BREACH.

Where the contract of sale of an interest in a business is silent as to warranty, evidence is nevertheless admissible to prove representations made at the time of entering into the contract and intended as a warranty to have been untrue; an action in damages as for breach of warranty upon such misrepresentations will lie whether the representations were fraudulently made or not.

[*Bentsen* v. *Taylor*, [1893] 2 Q.B. 274, 280, applied.]

Statement

APPEAL from Taylor, Dist. Court Judge.

*Frank Ford*, K.C., and *I. B. Howatt*, for plaintiff, appellant.

*O. M. Biggar*, K.C., for defendant, respondent.

The judgment of the Court was delivered by

Beck, J.

BECK, J.:—This is an appeal from the decision of Taylor, J.D.C., Edmonton, dismissing the plaintiff's claim without costs.

The plaintiff's story is this: The defendant and one Aitken were in partnership in the "gent's furnishing" business in leasehold premises in Edmonton. There were negotiations between the plaintiff and the defendant having in view that the plaintiff should buy the defendant's interest in the partnership. The defendant said he was willing to sell to the plaintiff at a price representing 100 cents on the dollar of the stock in trade and the furniture and fixtures and the outstanding book accounts which latter the defendant assured him were all good. The defendant was the bookkeeper of the firm and produced to the plaintiff a statement as follows:—

Aitken & Fulton,
Men's Furnishers,

A. E. Aitken.
J. H. Fulton.

Namayo Ave. & Boyle St.,
Edmonton, March 8th, 1912.

Statement.

Stock on hand, Feb. 29th, 1912, $9,913.14; furn. and fix., $1,935.10; accts. rec., $1,899.72; cash on hand Feb. 29th, 1912, $75.70; bank balance, $1.92; insurance paid in advance, $65; freight in advance, $125: Total, $14,015.58.

Liabilities: Accounts payable, $1,928.45; bills payable, $2,806.91; bank, $1,155: $5,890.36. Net worth, $8,125.22.

The defendant's interest in the business being one-half, he was entitled on the basis of 100 cents on the dollar to $4,062.61.

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The plaintiff had during the negotiations proposed to pay $2,000 down and the balance in about a month. It was agreed that if he paid $4,000 at once the $62.61 would be thrown off and the plaintiff accordingly paid the defendant $4,000 as the full consideration for his half interest in the partnership business. Some hours after the sale was concluded the plaintiff asked for some writing to shew his interest in the business and thereupon the defendant drew up a memorandum which was signed by Aitken, the plaintiff and the defendant. It was as follows:—

Aitken & Fulton,
Men's Furnishers,
Namayo Ave. & Boyle St.,
Edmonton, March 9th, 1912.

This agreement made in triplicate, dated March 9th, 1912, between J. E. B. DeWynter, purchaser, J. H. Fulton, vendor and A. E. Aitken, as party remaining in the business.

The purchaser agrees to buy and the vendor agrees to sell half interest in the men's furnishing business conducted at 427 Namayo Ave., known as Aitken & Fulton. The vendor agrees to relinquish half interest in all stock, fixtures, book accounts, leases, good will and any assets and liabilities belonging to said Aitken & Fulton. The purchaser agrees to assume half interest in all stock, fixtures, book accounts, leases, good will and any assets and liabilities belonging to the said Aitken & Fulton.

The consideration of this agreement to be four thousand dollars, to be covered by sight draft on Toronto.

It is further agreed that the force of this agreement shall commence March 1st, 1912.

It is further agreed between J. E. B. DeWynter, J. H. Fulton and A. E. Aitken that we are each and every one content with the terms and stipulations set forth in this agreement.

A. E. AITKEN.
J. H. FULTON.
J. E. B. DEWYNTER.

The plaintiff, although no doubt he might have done so, did not make any examination of the books, invoices or accounts on which the statement was based, but relied upon its being correct. The plaintiff brings this action alleging first a verbal agreement into which he entered on the basis of the truth of the statement of assets and liabilities furnished to him by the defendant whereby he agreed to pay at the rate of 100 cents on the dollar of the net assets and alleging as a second alternative the written agreement to buy at $4,000 into which he was induced to enter by the fraudulent misrepresentations of the defendant; and he claims damages and alternatively an account.

He sets out the particulars in which he alleges the statement was incorrect. They may be summarized as follows:—

Over valuation of fixtures, $106.25; over valuation of stock, $146; liabilities of the firm omitted, $439.67; accounts stated to have been owing to the firm but found not to be owing, $380.82; bad accounts, $126.35; Total, $1,199.09. Of which plaintiffs claims half, $599.50.

The learned Judge based his judgment upon the ground that the agreement between the plaintiff and the defendant had been reduced to writing and that he could not go behind that. He expresses no view upon the credibility of the witnesses though one may perhaps surmise that he took an unfavourable view of the defendant's evidence from the fact of his depriving him of costs.

The defendant's story is that the sale was made for $4,000 as a lump sum; that it was not made even upon the basis of the statement of assets and liabilities. I have no hesitation in believing the plaintiff's account of the transaction. His evidence is clear and distinct. It is corroborated by Aitken and by one Boyd. It accords with all the probabilities. The defendant's evidence, to my mind, is opposed to the probabilities.

I am quite satisfied of the substantial correctness of the plaintiff's story.

I think the evidence establishes a warranty on the defendant's part (1) that the accounts payable by the firm were as set down in the statement furnished by him to the plaintiff; (2) that the accounts receivable by the firm were also as therein set down; and that to the extent that the plaintiff can shew that the former item is less and the latter item greater than is set down in the statement he is entitled to damages as on a breach of warranty. As no evidence was taken on the quantum of these amounts there must be a reference.

As to the "over-valuation," as the statement of claim puts it, of the fixtures I think the plaintiff has not shewn that he is entitled to anything or to a reference.

The evidence does go to the extent of saying that the price was to be 100 cents on the dollar for the fixtures as well as the stock in trade, but I doubt very much whether this was the intention of either party. The plaintiff as I have said puts it as "over-valuation" in his statement of claim and one of the items

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of particulars is "cost of repainting signs." This suggests estimated value not cost price, at all events as to smaller articles and those subject to depreciation from wear and tear. The item of stock in trade is nearly $10,000; that of fixtures less than $2,000. The possible distinction in the method of making up of the two items—the one from the actual invoices; the other probably by estimate or at best from miscellaneous accounts for material supplied and work done at different times was not adverted to during the examination of witnesses. Items totalling the comparatively small sum of $106.25 might well have been the result of mere mistakes in calculation in ascertaining the large item of $1,935.10.

The Sales of Goods Ordinance (C.O., 1898, ch. 39, sec. 2, subsec. 1 (*o*)), defines a warranty as follows:—

> "Warranty" means an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated.

Whether a statement made in relation to the subject matter of a contract of sale is to be taken to be a condition (which under some circumstances sinks to the status of a warranty) or a warranty or a mere representation is a question of construction: *Behn* v. *Burness* (1863), 3 B. & S. 751, said in Ker & Pearson-Gee's Sale of Goods Act, p. 70, to be the *locus classicus* on the subject.

In *Bentsen* v. *Taylor*, [1893] 2 Q.B. 274, 280, it is said:—

> When a contract is entered into between two parties, every representation made at the time of the entering into the contract may or may not be intended as a warranty, or (*i.e.*, equivalently) as a promise that the representation is true. Where the representation is not contained in the written document itself, it is for the jury to say whether the real representation amounted to a warranty.

On the evidence, I think, as I have already said that the representation made by the defendant was, to the extent I have indicated, a warranty, that is, a promise that the representation was true and affords a ground for an action for damages independently of the question whether the representation was fraudulently or carelessly or innocently made.

In this view the question of the contract having been reduced to writing is of no consequence. A warranty is a collateral agree-

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ment to the main agreement and there is no rule which excludes it from being given in evidence.

In my opinion the appeal should be allowed with costs and judgment should be directed to be entered in the Court below for the plaintiff for the amount which shall be ascertained on the reference together with his costs of the trial and of the reference unless a Judge of that Court should otherwise order with regard to the costs of the reference.

*Appeal allowed.*

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MAN.

K. B.

## MICKELSON, SHAPIRO CO. v. MICKELSON DRUG CO.

*Manitoba King's Bench, Galt, J. March 12, 1915.*

1. INJUNCTION (§ II—134)—INTERIM INJUNCTION — NECESSARY ALLEGATIONS—DISSOLUTION OF.

A plaintiff seeking *ex parte* an interim injunction is bound to disclose on the affidavits and material submitted to the court all the material facts within his knowledge without either misrepresentation or concealment, and failure to do so is in itself a ground for dissolving the injunction; the plaintiff may, however, be given leave to apply for another injunction on the merits.

[*Mickelson* v. *Mickelson*, 15 Can. Ex. 276, referred to; *Fitch* v. *Rochford*, 18 L.J. Ch. 458, applied.]

Statement

MOTION to continue an interim injunction.

*E. Anderson*, K.C., and *R. D. Guy*, for plaintiff.

*A. E. Hoskin*, K.C., for defendant.

Galt, J.

GALT, J.:—This is a motion made by the plaintiffs to continue an interim injunction granted by Mr. Justice Prendergast on February 19, 1915.

The action is brought for an injunction to restrain the defendants from manufacturing, advertising, offering to sell, or trading in any preparations under the name of "Mickelson's Kill-Em-Quick Gopher Poison," etc., and for delivery up or destruction of labels and other documents or advertisements in the possession or power to the defendants, and for an account of profits made by the defendants in selling their preparations, and for damages.

The plaintiffs obtained their injunction *ex parte*, and they were therefore bound in their affidavit or affidavits to fully and fairly state the case within their knowledge so that the Court

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might see that, *primâ facie*, the granting of an injunction would be fair in the aspect in which it was presented to the Court. There must be no concealment or misrepresentation, but all the facts must be brought before the Court which are material to be brought forward. See Kerr on Injunctions, 5th ed., 551, and cases cited.

The only affidavit filed by the plaintiffs on their original application was one by Leo Shapiro, in which he says that he has carefully read over the allegations contained in the statement of claim and that the same are true in substance and in fact. It is true that the learned Judge who granted the injunction gave leave to the plaintiffs to file and read further material upon the return of a motion to continue the injunction, and that much further material was subsequently filed. It is only in rare cases that a party should be absolved from filing his complete material when he resorts to an *ex parte* application. The danger of swearing to a general verification of a statement of claim is well exemplified in the present case. The statement of claim contains, amongst others, the following allegations:—

3. On the 25th day of May, 1909, the said Mickelson Company caused to be duly registered in trade mark register No. 56, folio 13708, in the Department of Agriculture at Ottawa, a specific trade mark to be used in connection with the sale of the said gopher poison, consisting of an oval cut in which appeared four gophers in the grass, one of which has its front paws resting on the head of a cylindrical can bearing the words "*Mickelson's Kill-Em-Quick Gopher Poison Trade Mark.*"

4. On or about the month of October, A.D. 1912, the defendant Anton Mickelson, being the sole owner of the assets of Mickelson Chemical Company *and of the trade mark in question*, for valuable consideration, sold and transferred to the plaintiff company the said business of manufacturing and selling gopher poison, including the said trade mark and by instrument in writing bearing date the 2nd day of October, 1912, and duly registered in the said trade mark register No. 56, folio 13708, *the said defendant Anton Mickelson duly assigned the said trade mark to the plaintiff company, which is now the owner thereof*, as well as of the said business.

5. The Mickelson Chemical Company and the plaintiff as his successor have duly complied with all the requirements of the law respecting trade marks, *and the said trade mark, and the registration and assignment thereof, were valid and subsisting and in full force and effect, and were so at the time of the acts of the defendants hereinafter complained of.*

6. The plaintiff company has the exclusive right to use the said trade mark, and has since the date of the said assignment exclusively used the

same in its trade, business, occupation and calling for the purpose of distinguishing and designating gopher poison manufactured and produced by it, and the said gopher poison has acquired a very valuable and extensive reputation for excellence in the purposes for which it is so manufactured and sold.

On the 23rd April, 1914, the plaintiffs brought an action against the defendants in the Exchequer Court of Canada, alleging that on the 25th day of May, 1909, the Mickelson Chemical Company had caused to be duly registered in the trade mark register, No. 56, folio 13708, in the Department of Agriculture at Ottawa, a specific trade mark to be used in connection with the sale of gopher poison, consisting of an oval cut in which appear four gophers in the grass, one of which has its front paws resting on the head of a cylindrical can bearing the words "Mickelson's Kill-Em-Quick Gopher Poison—Trade Mark."

The plaintiffs further alleged that on March 16, 1914, the defendant company registered in the trade mark register, No. 79, folio 19498, in the Department of Agriculture at Ottawa, in accordance with the provisions of the Trade Mark and Design Act, a specific trade mark for gopher poison, the alleged trade mark being described as follows: "The specific trade mark consists of the words 'Kill-Em-Quick,' hyphenated as above written, accompanied by the fac-simile signature of the owner, preferably across the words 'Kill-Em-Quick.' The letters may be in red as shewn in the drawing of the specific trade mark hereunto annexed, or other coloured ink as may seem preferable."

In that action the plaintiffs claimed—An injunction restraining the defendants from the use of the plaintiffs' trade mark or any part thereof, etc.; and damages for the infringement of the plaintiffs' trade mark; and an order directing that the registration of the trade mark by the defendant company in register No. 79 might be expunged.

Judgment was delivered in the said action by Mr. Justice Cassels on December 19, 1914. From this judgment it appears that the plaintiffs' application for a trade mark was in part as follows:—

> The said specific trade mark consists of an oval cut in which appears four gophers in the grass, one of which has its front paws resting on the head of a cylindrical can.

The application for the plaintiffs' registration in addition to the statement of what the said specific trade mark consists of, has the following—"A drawing of the said specific trade mark is hereunto annexed." When the drawing is referred to,

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there appears to be written on the cylindrical can in small letters the words "Mickelson's Kill-Em-Quick Gopher Poison." In reference to this Cassels, J., said:—

> If these words form part of the plaintiffs' trade mark I would grant him relief, but I do not see how it can be held that they form part of the trade mark in question. The statute is specific in requiring a description. The description is specific in its terms, and does not claim these words as part of the trade mark. According to patent law it is clearly settled that in regard to a patent it is the specification which governs, and the drawings are merely for the purpose of illustration. . . .
>
> In an application for a trade mark the drawings might disclose more than the applicant desires to claim as a trade mark, but, in my judgment, where the application is described as in the trade mark upon which the plaintiff relies, it cannot be extended by reason of something appearing on the drawing which has not been claimed.

The statement of claim in the present case was issued on February 19, 1915, two months after the giving of said judgment. Yet the plaintiffs, in par. 3 of their statement of claim, above quoted, distinctly assert that their specific trade mark as registered, included the words "Mickelson's Kill-Em-Quick Gopher Poison—Trade Mark."

This untrue statement is continued throughout paragraphs 4, 5 and 6 (in words which I have italicized) and it was a most material misrepresentation.

The case made out by the affidavits on the motion must correspond with the allegations in the statement of claim: See *Burton* v. *Blakemore*, 2 Jur. 1062.

For the above reason, I am of opinion that the defendants are entitled to have the interim injunction dissolved. I purposely say nothing respecting the application in other respects. My decision will not preclude the plaintiffs from applying for another injunction on the merits: See *Fitch* v. *Rochford*, 18 L.J. Ch. 458, where Lord Chancellor decides this point during the argument. The plaintiffs are at liberty to amend their statement of claim as they may be advised. The defendants are entitled to their costs of the motion.

*Injunction dissolved.*

## DANIS v. HUDSON BAY MINES LTD.

ONT.

S. C.

*Ontario Supreme Court, Appellate Division, Mulock, C.J.Ex., Clute, Riddell, and Sutherland, JJ.*

1. MASTER AND SERVANT (§ II B—146)—MINING—ASSUMPTION OF RISK—VOLENS—APPLICABILITY—MASTER'S BREACH OF STATUTORY DUTY.

The maxim *volenti non fit injuria* is not applicable in relief of a defendant guilty of a violation of a statutory duty such as is imposed by the Mining Act, R.S.O. 1914 ch. 32.

[*McClemont* v. *Kilgour Co.* (1912), 8 D.L.R. 148, 27 O.L.R. 305, applied.]

2. MASTER AND SERVANT (§ II B—146)—MINING—EXPLOSION—STATUTORY DUTY OF MASTER—BREACH—LIABILITY.

A mining company owning and operating a mine is liable in damages to a miner employed by the contractor to whom the drilling operations had been let, for personal injury of such miner through an explosion on striking a missed hole which should have been blasted by the previous relay or shift and of which no report was made to him when he went on duty, where the company's system was faulty in not making provision as required by the Mining Act for reporting from one relay of men to the next that a charged hole had not exploded and in not seeing that proper directions were given to have it exploded before continuing the drilling as required by the statutory mining rules, sec. 164 of the Mining Act (Ont.); the duties in that respect are imposed upon the company and it is not absolved from responsibility by having contracted out to another the operation of the drilling machine.

[*Grant* v. *Acadia Coal Co.*, 32 Can. S.C.R. 427; *Britannic, etc., Co.* v. *David*, [1910] A.C. 74; *Butler* v. *Fife Coal Co.*, [1912] A.C. 149; *Vancouver Power Co.* v. *Hounsome*, 19 D.L.R. 200, 49 Can. S.C.R. 430, referred to.]

Statement

APPEAL by the defendants from the judgment of KELLY, J., at the trial, upon the findings of a jury, in favour of the plaintiff, in an action for damages for personal injuries sustained by the plaintiff while working in the defendants' mine.

*N. W. Rowell*, K.C., for the appellants.

*A. G. Slaght*, for the plaintiff, the respondent.

Clute, J.

November 30. CLUTE, J.:—The plaintiff on the 20th May, 1913, was engaged in running a drilling machine in the defendants' mine, and was injured by an explosion from a loaded hole, which had been fired but had not exploded.

The story of what occurred is given by the plaintiff and another witness. It would appear from the evidence that the defendants had let a contract to sink a shaft of 100 feet and then drift 600 or 700 feet upon a property about a mile and a half from their principal mine.

Poisson says that there was an arrangement that he was to have $10 a foot, and if that amounted to less wages than $3.50

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per day the defendants were to pay him and his men at that rate, and when he ran behind the defendants paid the wages accordingly of him and the one who worked with him. The superintendent of the mining company was one Brown, and the captain, Macmillan. Brown came and inspected the work once or twice a week. There was no special mine captain assigned to this mine. It seems to have been worked in connection with the company's mine at Cobalt, the inspection and oversight being by officers of the defendants. He states that there was no special captain or shift boss at this mine.

The plaintiff states that he got his powder from the defendants, brought there by their team. On the 19th, after drilling four or five holes, he loaded these holes and those drilled by the previous shift, making nine holes loaded by him. The nine holes were fired, but there were only eight reports. That was about 3 o'clock in the afternoon. The plaintiff and his partner did not go back to drill further on that day; there was too much smoke; it would take a couple of hours before the smoke would come out; that would bring it to about 5 o'clock, which was the regular quitting time. The night shift was going on at 7 o'clock. Before leaving the mine, the plaintiff left a note there stating that a hole had missed fire; the note was left by the candlestick which the next shift would take, "so that they would see the paper." That was the practice. The plaintiff told the blacksmith and the hoist-man that they might mention it also to the next shift.

The next morning, when the plaintiff returned to take his shift after the night shift had come off, the hoist man, Poisson, and the blacksmith were all there, but he received no message from any of them with reference to the missed hole. The plaintiff and his helper went down to the face of the drift, looked it over, and started to drill. Some work had been done during the night. The drill was set up ready to work; there had been three holes drilled during the night. There was some muck at the bottom of the drift. He examined the face of the drift with a candle. He found a piece of rock (called a "toe") sticking out further than the rest of the drift. They saw no indication of a missed hole. When they had drilled in about two feet, an explosion took place, and the plaintiff received the injuries com-

plained of. He states that if he had been warned that there was any hole not exploded he would not have drilled. The plaintiff's partner was killed. The plaintiff states that no mine captain or shift boss had reported to him anything in connection with the fact that there was a missed hole on the work he had taken up. He states that when there is a missed hole the practice is to shoot that over again before starting to drill other holes. In answer to a juryman, he stated that part of the muck had been cleared away, but some muck had fallen down after they started to drill. He states further that, supposing the night shift had found the missed hole and shot it over again, and muck had fallen from that, they would have cleared it back.

The plaintiff's position would appear to be that, he having given notice that there was a charged hole that had missed fire, it became the duty of the defendants so to manage their mine under the Act that he would be notified if it had not been fired, and in that case he would not have commenced drilling on the face of the drift where there was still a charged hole.

The following are the questions submitted to the jury and their answers:—

1. Was the injury to the plaintiff the result of negligence or was it a mere accident? A. Negligence.

2. If the injury to the plaintiff was the result of negligence, was there negligence on the part of the defendants which caused or contributed to the injury? A. Yes.

3. If there was such negligence on the part of the defendants, state fully and clearly what were the acts or act or omissions or omission of the defendants which caused or contributed to the injury? A. First, omitting having any system of reporting from one shift to another. Second, as the company had no agreement with Poisson of being liable for any accident, *it was there (sic) duty to have the work inspected daily, and reported on to the proper officials.*

4. Could the plaintiff, Danis, by the exercise of ordinary or reasonable care, have avoided the accident or injury? A. No. He took every precaution that could be expected of him.

5. If so, what should he have done or omitted to do to avoid the accident or injury?

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6. If on the answers you give to the above questions the Court should be of opinion that the plaintiff is entitled to damages, what amount of damages do you assess? A. $6,000.

7. What do you find to be the earnings of a person in the plaintiff's grade of employment for the three years preceding this happening? A. $3,375.

The negligence found is in effect that the defendants had no system of reporting from one shift to another, and that they neglected to have proper inspection, and, under the circumstances under which the plaintiff was engaged to do the work, it was their duty to have the work inspected daily and reported on to the proper officials.

The jury having assessed the damages at $6,000, the record was amended so as to claim that amount.

The grounds taken in the notice of appeal are: (1) that the judgment was against law and evidence; (2) that the findings of the jury were perverse and unwarranted by the evidence.

Having carefully read the evidence, I think it amply supports the findings of the jury. The mine seems to have been run in a very haphazard manner, with very slight, if any, oversight or direction from the company. It was urged, however, that the company were in no way responsible for this, and that the plaintiff's remedy, if any, was against Poisson.

The case turns, I think, upon the requirements of the Mining Act of Ontario, R.S.O. 1914, ch. 32, and of the Workmen's Compensation for Injuries Act, R.S.O. 1914, ch. 146.

[The learned Judge here referred at length to the Mining Act, sec. 164, rule 40.]

Reading this and other sections of the Act, I am of opinion that the duty of seeing that the provisions of the Act in its application to mining are carried out is imposed upon the mine-owner, as well as upon others, and that in this case the defendants are responsible for a disregard of their statutory duty in the working of this shaft where the plaintiff was injured.

According to Poisson's evidence, there was no shift boss or captain or superintendent other than Brown, who was superintendent at another mine of the defendants. There was no official or mine captain or boss there that night or at the time Poisson

went off duty the night before the accident, and he said that there had been none before that; that there was no superintendent or shift boss or mine captain there for two or three days before the accident; he further says that shift bosses did not work. In view of the evidence, I do not think it important whether the plaintiff may be regarded as working under Poisson or for the company by whom he was paid. It was the company's duty to see that the requirements of the statute were carried out.

The plaintiff, I think, was properly acquitted of negligence. The jury declared that he could not, by the exercise of ordinary care, have avoided the accident, and that he took every precaution that could be expected of him. The evidence warrants this finding. The trial Judge took especial care to bring before the jury the requirements of the Act, and their findings must be regarded with reference to the charge. There was, I think, ample evidence to support the findings.

[Reference to *Grant* v. *Acadia Coal Co.* (1902), 32 Can. S.C.R. 427; *Vancouver Power Co.* v. *Hounsome* (1914), 49 Can. S.C.R. 430, 19 D.L.R. 200.]

The maxim *volenti non fit injuria* is not applicable in relief of a defendant guilty of a violation of a statutory duty such as is imposed by the Factories Act: *McClemont* v. *Kilgour Manufacturing Co.* (1912), 27 O.L.R. 305, 8 D.L.R. 148.

Where the defendants employed a contractor to construct a bridge in conformity with the provisions of an Act of Parliament, but, before the works were completed, the bridge, from some defect in its construction, could not be opened, and the plaintiff's vessel was prevented from navigating the river, it was held that the defendants were liable for the damage thereby caused to the plaintiff: *Hole* v. *Sittingbourne and Sheerness R.W. Co.* (1861), 6 H. & N. 488.

[Reference also to *Britannic Merthyr Coal Co.* v. *David*, [1910] A.C. 74; *Butler* v. *Fife Coal Co.*, [1912] A.C. 149.]

In the present case the duty imposed by statute upon the mine-owner is clear and positive. There was not only no evidence on the part of the defendants that they had discharged their duty, but, on the contrary, there was positive evidence

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that they had not; nor did they carry on their business in such a manner that the requirements of the statute could be carried out. The meaning of the jury's finding, having regard to the statute, is, that the defendants' system was faulty in not making provision for a system of reporting to cover the danger arising in the case where a charged hole had not exploded.

I think the judgment as directed to be entered upon the findings of the jury is right, and that this appeal should be dismissed with costs.

Mulock, C.J.Ex. Sutherland, J.

MULOCK, C.J.EX., and SUTHERLAND, J., agreed.

Riddell, J.

RIDDELL, J.:—I have read the judgment of my brother Clute which is concurred in by my Lord and my brother Sutherland.

I cannot say that I am at all sure that the statute is correctly interpreted in that judgment, or the judgment appealed from: it seems to place too heavy a burden upon the owners of the mine under a statute which is at best doubtful.

Gravely to doubt is to affirm: and I do not feel strongly enough against my brethren to dissent formally.

It is to be hoped that the statute may be made clear either by the Supreme Court of Canada or by legislation.

*Appeal dismissed with costs.*

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SASK.

S. C.

## UNION BANK OF CANADA v. LUMSDEN MILLING CO.

*Saskatchewan Supreme Court, Haultain, C.J., Newlands, Lamont, and McKay, JJ. July 15, 1915.*

1. MORTGAGE (§ II—30)—EQUITABLE MORTGAGE—EXECUTIONS—PRIORITIES.

An assignment of the proceeds of a mortgage to cover an indebtedness to a bank in pursuance of a prior agreement by the debtor to place a mortgage on his lands whenever required by the bank, the mortgage being executed prior to but not registered after the filing of an execution, disentitles the bank, by virtue of the provisions of secs. 70 and 118(2) of the Land Titles Act (Sask.), as amended by sec. 17 of ch. 16 of Acts 1912-13, to claim priority by way of equitable mortgage over the execution creditor.

Statement

APPEAL from judgment for plaintiff.

*T. J. Blain*, for appellants.

*D. J. Thom*, for respondents.

The judgment of the Court was delivered by

LAMONT, J.:—The facts upon which the plaintiffs now rely are as follows: The defendant Ellison was the registered owner, free of encumbrance, of the east half of section 3, tp. 28, range 29, W 3rd. He was indebted to the plaintiffs and, on July 27, 1914, while still indebted to them in the sum of $2,300, he made application to the Canada Permanent Mortgage Corp. for a loan on said land of $4,000. The application was accepted, and on March 16, he executed a mortgage to the company to secure the said loan.

On March 23, 1914, Ellison saw the plaintiffs' manager at Alsask, and gave him a document which contained the following:

> I further agree that I will, whenever the said Union Bank of Canada requires me to do so, place mortgage on my lands for the purpose of paying off my indebtedness to them.

On April 1 he told the plaintiffs' manager that he was getting a loan through the Canada Permanent Mortgage Corp., and he gave to the bank an assignment of the proceeds of the loan.

On April 9, the defendants, the Lumsden Milling Co., filed in the proper land titles office an execution against Ellison for $730.28. On April 20, the mortgage company registered their mortgage.

That mortgage contained a clause by which neither the execution nor the registration of the mortgage should bind the mortgagees to advance the mortgage money. The mortgage company have not advanced any money whatever under the said mortgage.

On these facts the plaintiffs contended that they had an equitable mortgage under the document of March 23, which was effective at any rate from the date on which they obtained the order for the proceeds of the loan, and that it had priority over the defendants' execution. The action was tried before my brother Brown, who held, but with some doubt, that the plaintiffs had an equitable mortgage and that it took priority over the defendants' execution. From that decision the defendants now appeal.

In the view which I take of the effect of sec. 118, sub-sec. 2, of the Land Titles Act, as amended by sec. 17 of ch. 16 of 1912-13,

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it is unnecessary to determine whether or not the document of March 23 constitutes a good equitable mortgage; for, assuming that it does, the plaintiffs must still fail in their action as against the appellants. Sec. 118, sub-sec. 2, referring to a writ of execution, reads as follows:—

(2) Such writ shall bind and form a lien and charge on all the lands of the execution debtor situate within the judicial district of the sheriff who delivers or transmits such copy as fully and effectually to all intents and purposes as though the said lands were charged in writing by the execution debtor under his hand and seal from and only from the time of the receipt of a certified copy of the said writ by the registrar for the registration district in which such land is situated.

It was admitted by counsel for the plaintiffs that, had Ellison on April 9 charged his land in writing in favour of the defendant company for the amount of its execution and such charge had been registered, it would take priority over the plaintiffs' equitable mortgage. He, however, contended that notwithstanding the language of the section the execution remains an execution; and therefore that it could only attach to the interest which the debtor had in the land at the time the execution is filed in the land titles office, as was held in *Wilkie* v. *Jellett*, 26 Can. S.C.R. 282.

That it remains an execution is true, but it is now an execution with the force and effect given to it by the above statutory provision. The language of the section is explicit; it declares that the execution, from the time of the delivery of a copy to the registrar, shall form a lien and charge on all lands of the execution debtor as fully and effectually to all intents and purposes as though the said lands were charged in writing by the execution debtor under his hand and seal. The effect of this language, in my opinion, is that as regards lands to which an execution can attach, the execution creditor has now the same priority and the same interest in the lands of the execution debtor as he would have if the debtor had charged those lands under his hand and seal. If the debtor had so charged them, the execution creditor would, under sec. 70 of the Land Titles Act, have obtained priority over the equitable mortgage. That section reads as follows:—

Instruments registered in respect of or affecting the same land shall be entitled to priority the one over the other according to the time of registration and not according to the date of execution.

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An execution is an encumbrance. Land Titles Act, sec. 2, sub-sec. 7. An encumbrance is an instrument: sub-sec. 11.

The effect of the amendment, therefore, is to give an execution—a copy of which is filed in the proper office—priority over an unregistered equitable mortgage.

The appeal should be allowed with costs, and the judgment of the Court below set aside in so far as it gives the plaintiffs priority over the appellants' execution, and judgment entered for the appellants with costs.

*Appeal allowed.*

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## GARSIDE v. GRAND TRUNK R. CO.

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*Ontario Supreme Court, Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. March 15, 1915.*

1. RAILWAYS (§ III—55)—ACCIDENTS AT CROSSINGS—ENTERING BETWEEN GATES—CONTRIBUTORY NEGLIGENCE—FAILURE AS TO WARNINGS AND FLAGMEN.

Where the erection of gates at a level highway crossing is not authorized or required by an order of the Board of Railway Commissioners, the lowering of the gates is but a warning to persons desiring to cross the tracks that it is dangerous to do so, and the entry of a person upon the portion of the highways between the gates, when the gates are down, is not as a matter of law or *per se*, negligence, disentitling him to recover damages for injuries sustained by him while upon that portion of the highway, by reason of the negligence and breach of duty of the railway company as to signals and warnings.

Statement

APPEAL by the defendant company from the judgment of BRITTON, J.

*D. L. McCarthy*, K.C., for appellant company.

Sir *George Gibbons*, K.C., and *G. S. Gibbons*, for plaintiff, respondent.

The judgment of the Court was delivered by

Meredith, C.J.O.

MEREDITH, C.J.O.:—This is an appeal by the defendant from the judgment, dated the 13th January, 1915, which was directed to be entered by Britton, J., on the findings of the jury, at the trial before him, at London, on that and the previous day.

The action is brought to recover damages under the Fatal Accidents Act, for the death of Walter Joseph Garside, which was caused, as the respondent alleges, by the negligence of the appellant.

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The deceased was run down by a yard engine of the appellant, which was backing across Wellington street, in the city of London, without having a man stationed upon it to warn persons standing on or crossing or about to cross the track of the railway, and without, as the jury found, any bell having been rung before it began to cross the street to give warning that it was about to move.

Wellington street, which runs north and south, is crossed by six tracks of the appellant's railway, and there are gates at the crossing, which, when let down, extend from the east end of the sidewalk on the east side of the street to the west end of the sidewalk on the west side. The south gates are situate about 25 feet south of the south track, and the north gates are 10 or 15 feet north of the north track. The gates were down apparently because a freight train was moving eastward on the fourth track from the south. When the deceased, who was proceeding on foot and going north on the east sidewalk, came to the gates, he passed around or under them on that side of the street and walked diagonally to the west sidewalk and stood on the space between the second and third tracks, a little off the west sidewalk and to the west of it, waiting for the freight train to go by, when he was struck by the yard engine.

As I have said, the freight train was moving eastward on the fourth track, and the yard engine was standing with its rear end about on the east line of Wellington street; when the yard engine was moving, the deceased, who had not observed that it was moving, stepped a little closer to the fourth track, and was struck by the yard engine and killed. There was nothing on any of the other tracks except some "dead" cars standing on one of them.

The findings of the jury, except the one which exonerated the deceased from contributory negligence, were not challenged by the learned counsel for the appellant; but he contended that, when the gates were lowered, the right of the public to use the highway between them was suspended, and that the deceased in entering on that part of the highway was a trespasser, to whom the appellant owed no duty; or that his so entering

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was, in the circumstances of the case, as a matter of law or *per se*, negligence disentitling the respondent to recover.

It was not proved that the gates were erected or maintained in pursuance of any order or direction of the Board of Railway Commissioners for Canada, nor is there any statutory authority requiring or authorising the erection or maintenance of them, and in this respect the case of *Wyatt* v. *Great Western R.W. Co.*, 34 L.J.Q.B. 204, referred to by Mr. McCarthy, differs from the case at bar.

In that case railway companies were required by sec. 47 of the Railway Clauses Consolidation Act (1845), where the railway crosses a turnpike road or a public carriage road on a level, to erect and maintain sufficient gates across the road on each side of the railway and to employ proper persons to open and shut the gates; and by the section it was also provided that the gates should be kept constantly closed except during the time when horses, cattle, carts or carriages passing along the road should require to cross the railway; that the gates should be of such dimensions and so constructed as when closed to fence in the railway and prevent cattle or horses passing along the road from entering upon the railway; and that the persons entrusted with the care of the gates should cause them to be closed so soon as such horses, cattle, carts or carriages, should have passed through the gates, under a penalty of 40s. for every default therein.

It was held by the Court, Blackburn, J., dissenting, that the effect of this legislation was to prohibit members of the public to open the gates or to pass across the railway, except where the gates were opened by the persons whose duty it was to open them, and that the plaintiff was guilty of an illegal act by opening the gates and attempting to pass through with his horse and carriage, though there was no servant of the railway company there to open the gates, and the plaintiff had waited a reasonable time for him to come and open them; and the view of the Court was, also, that the effect of sec. 47 was to make the road a highway only when the gates were opened by one of the company's servants.

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It was further argued by counsel for the appellant that sec. 279 of the Railway Act (R.S.C. 1906, ch. 37) has the same effect as the section under consideration in the *Wyatt* case; but I am not of that opinion. Section 279* is a prohibitive section, designed to prevent a railway company, in carrying on the operations mentioned in it, from unnecessarily or unreasonably obstructing the traffic upon highways which its railway crosses, and does not confer upon the company any exclusive right to the use of that part of a highway upon which its tracks are laid during the time which the section allows for the operations with which it deals.

No case was cited which supports the contention of the appellant with which I am now dealing, although there are expressions to be found in the reasons for judgment in the American cases to which I shall afterwards refer, which appear to indicate that, in the view of the Courts, a railway company has the exclusive right of user of that part of the highway within the gates, when it has erected and maintains gates across the highway, and the gates are down.

In my view, that is not the law in this Province, at all events where in the case of a Dominion railway it is not shewn that the erection and maintenance of the gates is authorised or required by an order or direction of the Board of Railway Commissioners for Canada, and the lowering of the gates is but a warning to persons desiring to cross the tracks that it is dangerous to do so.

I am also of opinion that the other contention of the appellant's counsel is not well-founded. It is, no doubt, supported by decisions of the highest Courts of some of the States of the neighbouring Republic, and among them the Courts of Massachusetts, New York, and Illinois, but it is opposed to the view of the highest Courts of other States.

Among the cases which support the appellant's contention

*279. Whenever any railway crosses any highway at rail level, the company shall not, nor shall its officers, agents or employees, wilfully permit any engine, tender or car, or any portion thereof, to stand on any part of such highway, for a longer period than five minutes at one time, or, in shunting to obstruct public traffic for a longer period than five minutes at one time, or, in the opinion of the Board, unnecessarily interfere therewith.

are *Granger* v. *Boston and Albany R.R. Co.*, 146 Mass. 276; *Cleary* v. *Philadelphia and Reading R.R. Co.*, 140 Penn. St. 19; and *Hatch* v. *Lake Shore and Michigan Southern R. Co.*, 156 N.Y. App. Div. 394; and in Thompson on Negligence, 2nd ed., vol. 2, para. 1532, it is said that "the fact that the gates are lowered is a plain warning to every traveller approaching the crossing that it is unsafe to attempt to cross. If, in disregard of this warning, a pedestrian passes the gate in broad daylight, and enters upon the crossing, and, while watching one train, is struck by another and killed, his death will be attributed to his own recklessness, and it cannot be made the ground of recovering damages."

Among the cases in which a different view was taken are *Chicago and Western Indiana R.R. Co.* v. *Ptacek*, 171 Ill. 9, in which it was held that, although an act of imprudence, it is not negligence *per se* in every case, as a matter of law, for a person to attempt to cross a railway track in front of an approaching train when the crossing gates are down, and *Samkiwicz* v. *Atlantic City R.R. Co.*, 81 Atl. Repr. 833, in which it was held by the Court of Errors and Appeals of New Jersey that "it is not a sound legal proposition that the mere attempt of one on foot to cross over a railroad track at a highway crossing when the gates are down, in doing which he is injured, raises a conclusive presumption that 'he took all chances of the injury and cannot recover.' That the gates are closed is a circumstance to be taken into account in determining whether, under all the facts, he was negligent in not observing the warning conveyed, but it does not conclusively convict him of contributory negligence" (p. 834). And the same view was adopted by McLennan, P.J., who dissented from the decision of the Court in *Hatch* v. *Lake Shore and Michigan Southern R. Co.*, *supra*.

The reasoning of the Courts in the cases which are opposed to the appellant's contention commends itself to me as sound and preferable to that which led to the opposite conclusion; and, in my opinion, the fact that the deceased went upon the highway between the gates when they were lowered was not in itself sufficient to disentitle the respondent to recover; it was

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not *per se* negligence, and the learned trial Judge ought not to have instructed the jury that as a matter of law the deceased was guilty of contributory negligence; the lowering of the gates was a warning to the deceased that it was dangerous to cross the tracks, but it was a question for the jury to decide whether, under all the circumstances, he was guilty of contributory negligence. I would dismiss the appeal with costs.

*Appeal dismissed.*

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## THOMSON v. WILLSON.

*Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, Anglin, and Brodeur, JJ. March 15, 1915.*

1. MORTGAGE (§ VI A—70)—FORECLOSURE—SPECIAL PROVISO AS TO DEFERRED PAYMENTS—EFFECT ON ACCELERATION CLAUSE.

A purchase-money mortgage containing a proviso that the mortgagor may retain a certain sum out of the last instalment until he receives a conveyance of the interest of an infant who was a party to the conveyance with the vendor-mortgagee, does not disentitle the mortgagee to his remedy of foreclosure upon default, but the acceleration clause will not override the proviso as to the deferred sum, and recovery will be limited exclusive of that amount.

[*Willson* v. *Thomson*, 19 D.L.R. 506; 31 O.L.R. 471, varied.]

Statement

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario, 19 D.L.R. 506, 31 O.L.R. 471, affirming the judgment at the trial, 30 O.L.R. 502.

*T. Hislop*, for appellant.

*H. E. Choppin*, for respondent.

Sir Charles Fitzpatrick, C.J.

SIR CHARLES FITZPATRICK, C.J.:—The judgment should be varied by protecting the mortgagor in regard to the deferred payment of $1,000, the whole in accordance with the note made when judgment was delivered. I agree with Mr. Justice Anglin.

Davies, J.

DAVIES, J.:—I am to allow this appeal, but only to the extent and for the purpose of varying and reducing the judgment appealed from in regard to the one thousand dollars payable on the coming of age of the minor; costs of mortgagor to be allowed except as they have been increased on grounds on which he has failed.

I agree in the opinion of Mr. Justice Anglin.

Idington, J.

IDINGTON, J.:—This is a foreclosure suit of a mortgage given for part of the purchase money of the land covered by the mort-

gage. It seems from the mortgage and affidavit verifying the statement of defence that in order to make a complete title as intended by the parties to the sale and purchase, it was necessary that an interest of a minor should be conveyed when he attained the age of twenty-one years or an order be got from the Court.

To avoid the expense of such an order the parties hereto agreed that the appellant should be indemnified against the contingency of failure to procure such infant's conveyance on his attaining his majority. This was provided for in two ways. A bond was given appellant that said infant would, on attaining his majority, execute the necessary conveyance, and it was further provided by inserting in the mortgage in question immediately after the proviso fixing the terms of payment of the mortgage moneys, the following:—

Provided always and it is hereby agreed by and between the parties hereto that notwithstanding the times, dates and manner herein fixed for payment of the principal money hereby secured, the said mortgagor, his heirs, executors, administrators, or assigns may retain to his or their use the sum of one thousand dollars out of the last instalment of two thousand five hundred dollars payable on the first day of October, 1915, until such time as the said mortgagee, her heirs, executors and administrators shall have performed the terms and conditions of a certain agreement between the parties hereto, which agreement bears date the 30th day of January, 1913, entitling her or them to the due payment of the said sum of one thousand dollars under such agreement.

Instead of protecting the mortgagor in regard thereto, the formal judgment includes the said sum of $1,000 in the sum found due upon the said mortgage and fixes as usual the time for payment thereof and provides for foreclosure unless such sum paid on said date. That date would seem to be about a year and three months before said infant, if surviving, would attain his majority.

The judgment might by the terms become so oppressive as to work a forfeiture of appellant's rights. He might find it impossible to raise on the security of such a defective title the money needed to redeem. He could only offer security on that to which he had got a title. That security might not enable him to raise more thereon than the judgment debt less the $1,000, whereas if he could offer the security he had and the chance of

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a complete title he might provide, by a mortgage conditional on getting the complete title, for the $1,000 also.

In the Court of Appeal upholding the said judgment, reliance is placed upon the acceleration clause which in an ordinary case might be held to so bind a mortgagor that he must either pay up in full or be foreclosed if making default in a single payment and thus lose the advantage of the terms originally stipulated for unless, as I think, the Court could relieve him. It habitually did so.

I cannot think that the parties ever intended to deprive by virtue of the use of the acceleration clause in that way the benefit of the above proviso. And if the respondent mortgagee or any one else ever so intended I think there are several answers thereto. It is not the correct construction of the document, especially when read in light of the collateral agreements. Besides it is not infrequently the case that the consideration for the mortgage fails to be advanced and in such cases no matter what the terms of the mortgage may read the amount spoken of therein is duly cut down to the actual sum advanced. Such seems to me the nature of this interest estimated by those concerned to be worth a thousand dollars for the purpose of this mortgage and to become payable at a date when the infant would have attained his majority and as a charge on the land to be dependent upon his executing a release or other necessary conveyance, or said interest being otherwise, in possible contingencies, conveyed to the mortgagor or his assigns.

In the meantime for convenience sake the agreed upon price of $1,000 is included in the mortgage.

If the mortgagee is determined to foreclose it must, for the purpose of this suit meantime, be treated as money not advanced and deducted from the main consideration.

Then again, if the general principles upon which Courts of equity proceed in foreclosure are involved, and the cases relied upon by appellant are reasonably applied, there would be no difficulty in the matter. If the mortgagor fails to pay the sum found due, less this $1,000, the mortgagee gets the property that she conveyed and so ends the matter so far as this mortgage is concerned. If, on the other hand, the mortgagor redeems, it

can be provided in such case that it shall stand as security for the $1,000 (till such time as she has had the opportunity contemplated by the parties of procuring the conveyance contracted for) with interest in the meantime thereupon.

Then again to do otherwise seems to me to contravene the policy or jurisprudence of the Courts of equity relative to the relief to be given against penalties and forfeitures. I think it is quite possible that the extremely unreasonable contention set up by appellant that no proceedings could be had herein till said interest was got in, caused the Courts below to overlook the need for giving the relief indicated above by modifying the judgment accordingly. The authorities relied upon do not justify the pretension set up by the appellant. The principle some of them proceed upon, I repeat, does justify the application thereof to this sum of $1,000. If the judgment is amended by the deduction of $1,000 from the sum found due, it will be necessary to name a new day for payment. That need not be the original length of time given, but say a month after the formal judgment issue herein. If the security is ample, or a payment made so to reduce the amount as to make it ample, the parties would be well advised I imagine to fix the new date at a time that would enable the conveyance to be got and agree to add a term to the judgment anticipating such conveyance and making the whole sum as it now stands be payable in such event on the new date.

In any event the appeal should be allowed and the judgment varied.

The appeal should be allowed with costs but without costs to either party of the appeal to the Court of Appeal and the original judgment be varied by deducting $1,000 from the amount found due and also by providing as already suggested for the contingency of redemption and the security standing to secure the $1,000 and interest thereon to abide the result of the title being completed within a reasonable time to be agreed upon, or in default thereof, fixed by the registrar, and failing that, the discharge or reassignment to appellant of the mortgage.

I have an impression on the opening of the argument herein that all this might have been easily obtained by an application

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to the Supreme Court of Ontario, but the judgment of the Appellate Division rather indicates otherwise. Hence I would allow costs of appeal here, because I still think by some such reasonable course as I suggest the present relief might have been sought for and possibly obtained without coming here, if the claim to deprive the respondent of all relief had not been so unreasonably persisted in.

Since writing the foregoing a reading of the full text (from copy since handed in) of the statutory meaning to be given said acceleration clause as it stands in the mortgage, confirms the impression I had relative to the power of the Ontario Courts in the premises. An explanation of that by counsel or in the judgment appealed from might have saved some labour. I still prefer that the parties should be left to work out an amendment protecting them both in the way indicated above, and in other opinions delivered herein, and possibly save needless expense rather than forcing them to accept the amendment proposed; should they fail, of course, the registrar would have to settle the minutes relative to amendment, etc. The $1,000 in question forms such an unusual part of the consideration and is subject to so many contingencies that it seems to me the usual form of judgment in foreclosure is not quite appropriate. That form by no means bounds the equitable jurisdiction of the Court.

The appellant is told he can have a sale if he so elect and I presume pay for. But what a tangle would ensue unless exceptional provision made for such an event. And I do not know whether or not desired and if it is worth while to provide therefor. Leaving it to the parties first to try and frame what would suit is for that as well as many other reasons desirable.

In argument here it was quite clear to my mind neither counsel had anticipated the view we have taken and hence we are without their aid in this regard. The case is not one to call for re-argument. It is not desirable to have the whole $1,000 eaten up in costs.

Duff, J.

DUFF, J.:—I agree with Mr. Justice Anglin.

Anglin, J.

ANGLIN, J.:—The appellant's contention that his default in payment of interest and of certain principal moneys due upon

his mortgage to the respondent did not entitle the latter to the remedy of foreclosure, because, as to $1,000 of the final instalment of $2,500 of principal, the mortgagee had agreed that it should not be payable until a deed of a supposedly outstanding interest in the property in question held by an infant had been furnished to the mortgagor, seems to me to be most unreasonable. *Burrowes* v. *Molloy*, 2 Jones & La T. 521, on which the appellant relies, was not at all such a case. There the mortgagor had covenanted that the whole principal should not be called in before a certain time, and that time had not arrived. In *Cameron* v. *McRae*, 3 Gr. 311, there is, no doubt, a passage in the judgment of the Chancellor, at p. 314, quoted in *Parker* v. *Vinegrowers' Association*, 23 Gr. 179, at 186, which lends some support to the proposition for which Mr. Hislop cites it, that is to say, that when a mortgagee has disabled himself from calling in any part of the principal he is not entitled to the relief of foreclosure in respect of the balance. But the passage relied upon is merely a dictum, and I cannot regard these cases as authorities which require an extension of the rule stated in *Burrowes* v. *Molloy*, 2 Jones & La T. 521, to a case where part only of the principal is postponed, as it is here. Indeed, in *Parker's Case*, 23 Gr. 179, at 182, Blake, V.-C., says:—

> There is no doubt that the right to redeem implies the right to foreclosure and *vice versâ*, but because these rights are reciprocal it does not follow that the identical conditions attached to the one right are to be attached to the other. . . . Holding as I do that all the terms on which the alternative right of foreclosing or redeeming may be exercised, need not be identical, it is not necessary to consider on what exact conditions under this instrument the defendants could redeem. It is only incumbent on me to decide whether there has been such default on the part of the defendants, as that, *in invitum*, they can be compelled through a foreclosure suit to pay any, and if so what portion of the money secured by the mortgage.

By the default in payment of interest and of an instalment of principal the mortgagor broke the condition on which the mortgage was to become void, and at law forfeited all his rights in the land, thus entitling the mortgagee to bring foreclosure proceedings to extinguish the equity of redemption which the mortgagor still retained. Except as to the $1,000 there was

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no agreement to defer payment or to postpone the right to foreclosure for default. As put by Meredith, C.J.C.P.:—

> So the case is a simple one of default in payment of the first instalment due on the mortgage, a default which, at law, forfeited all the mortgagor's rights in the land, but in equity left in him a right to redeem. . . .
>
> Nor does foreclosure create any difficulty or work unjustly against any one. If foreclosure takes place, the mortgagee merely gets back that which she conveyed and the mortgagor loses only that which she has paid —the usual case.

The mortgagee by foreclosure will not obtain and cannot make title to the outstanding interest which was not vested in her mortgagor and was not mortgaged to her. She forecloses only on the mortgagor's equity to redeem that which he conveyed as security, *i.e.*, the interest which he had in the lands.

But I am, with respect, unable to accept the view which prevailed in the Appellate Division that the acceleration clause in the mortgage overrides the special provision by which the payment of the final $1,000 of principal moneys was deferred, or that, reading the mortgage as a whole with the incorporated agreement, the right to the postponement of the payment of that sum was "conditional on there being no default in payment of interest." In the first place the agreement to postpone the payment of the $1,000 is not made subject to any such condition. It is an absolute undertaking that the mortgagor may retain this part of the principal until delivery to him of a conveyance of the infant's outstanding interest. Although it will usually be implied without express stipulation that postponement of the payment of principal is conditional on punctual payment of interest: *Seaton* v. *Twyford*, L.R. 11 Eq. 591; *Edwards* v. *Martin*, 25 L.J. Ch. 284, the form in which the stipulation in the present case is couched, I think, prevents any such implication arising as to the $1,000 in question upon default either in payment of interest or in payment of instalments of principal as they fall due. We cannot ignore the fact evidenced by the agreement incorporated in the mortgage that the $1,000, of which payment is deferred, was a part of the purchase money for which the purchaser-mortgagor has not yet received the consideration, and which it was clearly intended should not become payable until the infant's interest in the lands, which it repre-

sents, should be vested in him. Having regard to all the circumstances and to the intent of the parties as manifested by the terms of the mortgage and agreement it seems reasonably clear that the acceleration clause in the mortgage cannot have been intended to apply to this $1,000, of which payment was thus specially postponed, but only to other portions of the principal moneys which might not be overdue when default occurred.

It follows that, without affecting any right of the mortgagor under the provisions of Rule No. 485 of the Ontario Supreme Court Rules of 1913, the judgment pronounced in this action should be modified by excluding from the amount for which the mortgagee is given the right of immediate personal recovery against the mortgagor the postponed $1,000. While redemption can only be awarded on payment of the whole sum secured by the mortgage, which includes the $1,000 deferred, the mortgagor is entitled to have this action stayed on payment of the sum secured less that $1,000. This can be accomplished by inserting in the decree, as par. 2*a*, the following:—

> And upon defendants paying into the said head office of the Canadian Bank of Commerce to the joint credit aforesaid, and at the time aforesaid, the sum of $6,287.15, this Court doth order and adjudge that all further proceedings in this action, except an application for payment of said moneys over to the plaintiff, be stayed;

by inserting in clause 3 after the word "payment" the words, either under paragraph 2 or under paragraph 2*a* hereof,

and by substituting in clause 4 for the figures "$7,080.90" the figures $6,080.90"—all this, of course, as of the date of the judgment as originally pronounced. In view of the delay occasioned by the appeals to the Appellate Division and to this Court the figures and dates in that judgment will require to be altered. That can be done by the registrar in settling the minutes of judgment.

The appellant having succeeded, though only on a minor point, should have his costs in this Court, except in so far as they have been increased by his having taken grounds on which he has failed.

BRODEUR, J.:—I concur with Mr. Justice Anglin. Brodeur, J.

*Appeal allowed with costs.*

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## CHRISTIE v. LONDON ELECTRIC CO.

*Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. March 15, 1915.*

1. MASTER AND SERVANT (§ II A 4—67)—DUTY AS TO SAFETY—DECAYED POLE—INJURY TO LINEMAN—LIABILITY OF MASTER.

The decayed condition of a pole, undiscovered because of the master's negligent inspection, will render the master liable for the death of a lineman caused by his jumping from the pole as it appeared to be about to fall.

2. MASTER AND SERVANT (§ II C 1—185)—INJURY TO LINEMAN—CLIMBING POLE—DISREGARD OF PRACTICE—CONTRIBUTORY NEGLIGENCE.

The disregard by a lineman of a practice, not a rule, in not ascending an old pole before it was lashed to the new pole is not in itself contributory negligence to warrant a withdrawal of the case from the jury.

[*Randall* v. *Ahearn & Soper*, 34 Can. S.C.R. 698, applied.]

Statement

APPEAL from the judgment of BRITTON, J.

*D. L. McCarthy*, K.C., and *W. R. Meredith*, for appellant.

Sir *George Gibbons*, K.C., and *G. S. Gibbons*, for plaintiff, respondent.

The judgment of the Court was delivered by

Meredith, C.J.O.

MEREDITH, C.J.O.:—This is an appeal by the defendant from the judgment, dated the 22nd January, 1915, which was directed to be entered by Britton, J., on the findings of the jury, at the trial before him at London on the 14th day of that month.

The action is brought under the Fatal Accidents Act, to recover damages for the death of John Christie, which, it is alleged, was caused by the negligence of the appellant.

The main facts are not in controversy, and are as follows. The deceased was an experienced lineman, and had been employed by the appellant for several years. On the 28th July, 1914, the day upon which he met his death, he and three fellow-employees were working under the superintendence of John McKeown, their foreman. The appellant had decided to remove some of its poles on Dundas street, in the city of London, and some time before had erected new poles, which were intended to replace the poles that were to be removed, and these new poles were erected close to the old ones. The poles were fourteen or fifteen inches in diameter at the butt, and the distance from the centre of the new pole to the centre of the one which was to be removed was about two and a half feet. The poles were not straight, but bent out near their tops, so that the distance

between them at the top was between four and five feet. The wires and cross-arms had not been removed from the old poles, and it was for the purpose of removing them that the deceased and his fellow-employees were there. The deceased ascended one of the poles which were to be removed, and, before commencing to cut the wires that were attached to it, noticed that it was shaky, and called out to one of the men, Morris by name, who was on the ground, that he did not think the pole was safe, and at the same time, to shew that it was shaky, gave the pole "a little teeter, a shake." Morris called back to him not to cut the wires until he (Morris) had called the foreman. The pole commenced to move as if to fall towards the street, when the deceased jumped for the new pole, but failed to catch it with his hands, although his spurs caught it; and he fell to the ground and was instantly killed. The foreman, McKeown, was at the time upon the ground about one hundred and twenty feet away from the pole.

Upon an examination of the pole after the accident, it was found that it was badly decayed at the butt, close to the ground, and there was a hole in it on the side towards the street into which a man's hand could be put. This condition of the pole was not observable at the time of the accident, on account of the earth that had been left over after the erection of the new pole having been heaped up at the butt of the old pole to the height of about a foot and left there, concealing the hole.

There was nothing, as far as the evidence shewed, to indicate that the pole which the deceased had climbed was decayed, or that it was not safe to climb it, except in so far, if at all, as the fact that it was about to be replaced by a new pole was evidence of it.

The witness Morris testified that, owing to the distance between the two poles at the top, it would have been, if not impracticable, at least difficult, for the deceased, if he had gone up the new pole, from his position on it to have removed the cross-arm. Morris also gave evidence which, it was argued, shewed that it was improper for the deceased to climb the old pole, or, if he went up it, to have done so before the two poles had been lashed together.

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If the course taken by the deceased was an improper one, it is somewhat singular that he was not prevented from taking it by the foreman McKeown, who had the oversight of the deceased and the men who were working with him, and was only a short distance away from the pole which was climbed by the deceased. It was also in evidence that there were no ropes for lashing the poles together provided for the work the deceased and his fellow-workmen were doing.

The jury, in answer to questions, found:—

(1) That the appellant was guilty of negligence which caused the death of Christie.

(2) That the person who was guilty of negligence was the appellant's pole inspector.

(3) That his negligence was "in reporting pole to be in a fair condition, when from the evidence produced it was shewn pole was rotten and had been for some time, and quite unsafe for a man to work on."

(4) That the deceased could not, by the exercise of reasonable care, have avoided the accident.

And upon these findings the trial Judge directed that judgment should be entered for the respondent for the sum at which the jury assessed the damages.

There was, I think, evidence to warrant the conclusion that the pole which the deceased climbed had been inspected by some one appointed by the appellant to make the inspection, and that he was negligent in making the inspection and reporting that the pole was in fair condition, when even a superficial examination would have shewn that it was not in any such condition, but, as the jury found, was rotten and quite unsafe for a man to work on, and the jury's view evidently was that, if the inspector had done his duty and the appellant its duty, there should have been something put upon the pole to indicate that it was unsafe to climb upon it, or that the deceased should have been warned of the true condition of the pole and of the danger he would incur if he climbed on it, and that, instead of doing this, the dangerous condition of the pole was concealed from the deceased by the earth which had been heaped up at the butt of it by the servants of the appellant.

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That the deceased came to his death while in the performance of a duty which he was called upon to perform, and that, apart from the question of contributory negligence, his death was occasioned by the condition of the pole is, I think, beyond question.

The question as to the deceased having climbed the old pole and having done so without seeing that it had been lashed to the new pole, and as to the giving way of the old pole having been caused by the deceased shaking it, were questions bearing on the issue as to contributory negligence, and the jury has acquitted the deceased of that.

There were circumstances that probably weighed with the jury in reaching that conclusion, and among them the following: the improbability of the deceased, who, as I have mentioned, was an experienced lineman, risking life or limb if he thought there was danger to be apprehended from climbing the old pole; the fact that the dangerous condition of the old pole was concealed, and that it was classed as a fair pole; the fact that it was impracticable, or at all events difficult, for him to have removed the cross-arm if he had climbed the new pole; the fact that there were no ropes or wires provided for lashing the two poles together; and the fact that the foreman was upon the ground superintending the work and made no objection to the deceased climbing the old pole; and it is, in my opinion, impossible to say that the finding that the deceased was not guilty of contributory negligence was one that twelve reasonable men might not have made.

The principle of the decision of the Supreme Court of Canada in *Randall* v. *Ahearn & Soper Limited* (1904), 34 S.C.R. 698, is, I think, applicable. In that case the plaintiff, who was an employee of the Ottawa Electric Light Company, was engaged for his employers in placing a transformer upon a telegraph pole, to which the defendants had attached wires for carrying power from the electric light lines to buildings which the defendants desired to illuminate, when his hands touched the ends of a tie wire, which was not insulated, by which he received a shock, and, falling to the ground, was seriously injured. A rule of the electric light company directed every employee

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whose work was near apparatus carrying dangerous currents to wear rubber gloves, which would be furnished on application, and the plaintiff was not wearing such gloves when he was hurt, and it was held that the mere fact of the absence of gloves was not such negligence on the plaintiff's part as would warrant the case being withdrawn from the jury.

Putting the appellant's case on the highest ground that it can be put, the deceased was chargeable only with disregarding, not a rule of his employer, but a practice, in not seeing that the two poles were lashed together before he climbed the old pole; and, if the disregard of the rule as to wearing rubber gloves did not warrant the case being withdrawn from the jury in the *Randall* case, I do not see how the mere fact of the disregard by the deceased of the practice as to lashing the poles together would have warranted my brother Britton's withdrawing this case from the jury.

There is more difficulty as to whether the findings of the jury were sufficient to entitle the respondent to have judgment entered for her; but, after much consideration, I have come to the conclusion that they were, if the findings of the jury are to be taken to mean what I have said I think they do mean; and this is a case in which, if the findings are insufficient, the Court ought to exercise the power it possesses and find the facts to supply what the jury has omitted to find, if the evidence warrants such a finding. If the answers of the jury to the first three questions and the finding as to contributory negligence stand, there is no difficulty in reaching the conclusion that, if there had been a proper inspection, the true condition of the old pole would have been discovered, and there would have followed from the discovery a duty on the appellant's part to give warning to the deceased of the condition of the old pole; but, instead of that being done, it was classed as a fair pole; and what would have disclosed to the deceased that it was not such a pole was concealed from him by the act of the appellant in covering with earth the hole at the butt of the pole.

It appears to me that the appellant is on the horns of a dilemma. If there was no inspection, it was guilty of negligence because, having regard to the age of the old pole and the

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other circumstances in evidence, it was the duty of the appellant to have inspected it, and there was a failure to perform that duty, the result of which was that the deceased was led to believe that it was safe to climb it; and his death was, therefore, occasioned by the negligence of the appellant. If, on the other hand, there was an inspection, and the person who inspected the old pole reported, contrary to the fact, that it was a fair pole, he was guilty of negligence which caused the accident, because, if he had ascertained the true condition of the pole and reported it, the duty of the appellant would have been to have warned the deceased of its condition.

Upon the whole, I am of opinion that the appeal fails and should be dismissed with costs.

*Appeal dismissed.*

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## HALIFAX POWER CO. v. CHRISTIE.

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*Nova Scotia Supreme Court, Sir Charles Townshend, C.J., Russell, Longley, and Ritchie, JJ. January 12, 1915.*

1. EJECTMENT (§ I—1)—RIGHT TO REMEDY—PURCHASER IN POSSESSION OF LANDS.

A vendor who has put the purchaser in possession on being paid the purchase money has lost his right to maintain ejectment against the latter although no grant or formal conveyance was made; nor can the heirs of such vendor maintain ejectment against the successors of such purchaser in the possessory title long acquiesced in by the decedent vendor and by themselves.

2. EVIDENCE (§ IX—675)—ADMISSIONS—OWNERSHIP OF LANDS—ADMISSIBILITY.

Where the question at issue was whether the decedent, a former owner from whom no conveyance could be shewn, was or was not the owner at the time of his death, his admission that he had sold the land to defendant's predecessors whom the evidence shewed he had let into possession and who with their successors had since exercised acts of ownership such as logging on it, is admissible on defendant's behalf in the absence of any written evidence of the sale as a statement against decedent's interest to support the theory that he had sold the land and no longer claimed any title or interest therein as against plaintiff's claim of title under conveyances from such decedent's heirs taken with notice of such alleged sale and adverse possession; the admission was not in derogation of any grant made by the decedent, and as the plaintiff had identified himself in interest with the decedent, the latter's statement was admissible in evidence whether or not he was in possession at the time the admission was made.

[*Ivat* v. *Finch*, 1 Taunt. 141, applied.]

Statement

ACTION for trespass to land.

*H. Mellish*, K.C., for appellant.

*T. S. Rogers*, K.C., for respondent.

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Ritchie, J.

The judgment of the Court was delivered by

RITCHIE, J.:—This is an action of trespass for cutting logs on the Indian river. The lot in respect of which the action is brought is known or spoken of in the evidence as the 634 acre lot. An injunction, damages and a declaration as to title is claimed. The defendant justifies under Lewis Miller and Co., setting up title in them. The Statute of Limitations is also relied on. The lot in question was originally granted to Fader and Mason. The interest of Fader was conveyed to Mason by deed dated January 8, 1877. The learned trial Judge has found as a fact that Mason after he acquired Fader's interest sold the lot to N. L. Todd. It is contended on the part of the plaintiff that there is no legal evidence to support this finding. I will deal with that contention at a later stage. There is no deed so far as the evidence shews from Mason to N. L. Todd. I continue the statement of facts in the words of the learned trial Judge:—

> In May, 1886, there is a declaration of trust by N. L. Todd that he holds all the property at St. Margaret's Bay, for N. L. Todd and Co., as partnership property for the Todds, naming them, and one Hill. Hill, in 1893, reconveyed his interest to the Todds. In March, 1896, the Todds conveyed to the Youngs. The Youngs had already been put into possession by the Todds. The Youngs, on February 21st, 1901, conveyed to one Patton, trustee for a company to be formed, and on April 21st, 1901, Patton conveyed to the Dominion Lumber Co., and on October 3rd, 1903, the latter company conveyed to Lewis Miller and Co., under whom the defendant justifies. The 634 acre lot in dispute is covered by the later deeds in a block of 2,086 acres, and that is capable of identification and being followed on the ground by timber people.

The plaintiffs well knowing that Lewis Miller and Co., were in possession of the lot claiming to own it, obtained quit claim deeds from the heirs of Mason which conveyed to them any right which they might have, but I am of opinion that these heirs had nothing to convey. The learned trial Judge has found as a fact that the Masons have been out of, and Lewis Miller and Co., and their predecessors in title in possession for more than the statutory period. So that on this branch of the case the only function of a Court of Appeal is to see if there is evidence upon which the finding could properly be made. I have gone over the evidence with great care, and in my opinion there is ample

support for the finding. The learned Judge has also dealt with the law and referred to the authorities. I agree with him both as to the law and the facts and see no object in restating what appears in the judgment. So far as the Miller lands being marked in red on the plan in their office is concerned, if it stood alone I do not know that I would attach very much importance to it, but I regard it as a make weight and as entitled to consideration as such. A point not dealt with in the judgment is as to whether or not the evidence of John Mason that J. William Mason told him he had sold the land in question to Todd and Polleys was properly received. If J. William Mason had been asserting title to this lot in an action brought by him for the recovery of the land or for trespass, what he said to John Mason would, I think, have been evidence against him. His statement would afford a presumption against his title. If he was giving evidence on his own behalf in such an action and was asked on cross-examination whether he had made the statement or not and his answer was in the affirmative, the answer would be relevant because a man disclaiming ownership is speaking against his interests. It is disserving evidence and therefore probably true. If the relevant fact could be got from him on cross-examination it could be given against him by a witness called by the other side. It is urged that the evidence was improperly received because J. William Mason was not in possession at the time the statement was made, but I go to the reason for receiving the evidence, and that is, because it is against interest or as it has been expressed, affords a presumption against his ownership of the property. This being the principle upon which the evidence is received, I cannot see in this case, where Mason by the statement was not derogating from any grant made by him, what difference it makes whether he was in possession at the time or not. If in an action brought by Mason in respect of this land evidence of the statement referred to was tendered, I cannot think that it ought to be rejected. Having arrived at this conclusion, that this evidence would be admissible against J. William Mason, the next step is to consider whether it is admissible against the plaintiffs in this action. I think it is, because the plaintiffs have identified themselves in interest with

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J. William Mason their title is dependent upon his title. They claim to have acquired his title by deeds from his heirs. The question is, had he title at the time of his death. The same question arose in *Ivat* v. *Finch*, 1 Taunt. 141. The action was for the conversion of three mares and the only question was whether Alice Watson owned them at the time of her death. From the statement sought to be given in evidence I think it appears that she had parted with the possession of the mares when it was made. It was proposed to prove that Alice Watson had stated that she had retired from business and given up her farm and stock to the plaintiff. Lord Ellenborough refused the evidence on the ground that the statement was not accompanied by any act relative to the management of the farm. This ruling was reversed. The decision of Lord Mansfield is short and to the point. I quote it:—

> The evidence ought to have been received; though undoubtedly such declarations would be entitled to a greater or less degree of attention according to the circumstances by which they were accompanied. The admission supposed to have been made by Miss Watson was against her own interests. Had this been an action between Miss Watson and the present plaintiff, her acknowledgment that the property belonged to him might clearly have been given in evidence. It ought therfore, to have been received in the present instance because the right of the Lord of the Manor depended upon her title.

This decision was given a long time ago but like the great majority of Lord Mansfield's decisions it has stood the test of time. The case is referred to in the books but I cannot discover that doubt has ever been thrown upon it. The question of the admissibility of the statement made by Mason becomes an element on the second branch of the case, with which I will deal, but so far as the Statute of Limitations is concerned I would come to the same conclusion as that arrived at in the judgment appealed from without any evidence of this or the other statements against interest.

The Statute of Limitations is, in my opinion, fatal to the plaintiffs' case and I would be content to rest my opinion solely on that ground except that Mr. Rogers, K.C., strongly urged an additional ground upon which he contended the judgment ought to be upheld. It is said that N. L. Todd and Co., the predeces-

sors in title of Lewis Miller and Co., having been put in possession as purchasers by J. William Mason, he then being the owner in possession, neither he nor his heirs or assigns could eject N. L. Todd and Co., or their successors in title. Of course, if the plaintiffs were purchasers for value without notice this position could not be taken. It is beyond question that the plaintiffs took the deeds from the heirs of Mason with notice that he had sold the property in his lifetime. In support of the purchase from Mason by N. L. Todd and Co., the following four grounds are relied on: (*a*) By the admissions of J. W. Mason proved by John Mason. (*b*) By the admission of the widow, she being the executrix of J. W. Mason and his devisee for life (with power of sale). (*c*) By the repudiation of ownership by the only two living children of Mason (Norman and Mrs Blakeney), and under whom the plaintiff company claims and who warned the plaintiff company that the lands had been parted with. (*d*) By possession on the part of the Todds and their successors and the acquiescence therein of the alleged owners for a period of 36 years of which 21 years have elapsed since the death of the widow—a possession under the circumstances referable only to ownership.

Assuming that the evidence in support of the first three grounds was admissible, as I think it was, it is, in my opinion, not reasonable to come to any conclusion other than that the Todds entered under Mason in pursuance of a purchase from him. There is the statement as to the sale by Mason, the fact of the entry and continuance in possession. MacDonald, the executor of Mason, says that Elizabeth, his widow, told him in reply to enquiries as to whether there was any property belonging to the estate other than the house in Halifax, that it "was all sold long ago." I cannot think that the widow would not know whether this land had been sold or not. A knowledge of the class of people and station in life of Mason and his wife forbids any other conclusion. A real estate owner in a large way of business in a city very likely might not tell his wife that he had sold a particular piece of property, but to say that Mason would not tell his wife when he sold this property at St. Margaret's Bay, where they had lived for many years, does violence

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to common sense. If she did not know it had been sold she would have as a matter of course wanted it to go into the estate. The inventory was filed in the usual way without it. Norman Mason, one of the heirs, told McColl who was purchasing for the plaintiffs, that he was selling something he did not have—he thought it had been sold by his father. So did his sister Mrs. Blakeney, and notice was again given to the plaintiffs through Cruik. But the fourth ground which is apart entirely from the evidence to which I have been referring, is sufficient to convince me that there was a purchase from Mason. It would be, I think, unreasonable to the last degree to believe that Mason would have stood by and acquiesced in the Todds going into possession of his land, continuing for many years in possession, logging on it, and using it as their own, if there had been no sale.

There is, in my opinion, nothing from which inferences of fact can be more safely drawn than the evidence of people at the time, applying to their conduct one's ordinary every day knowledge of human nature. I am satisfied of the purchase from and the letting into possession of the Todds by Mason. This being so there is I think but one answer and that in the negative to the question as to whether Mason could have ejected the Todds or their successors in title. I do not think it is necessary for me to elaborate this point. A man cannot get by inheritance a right from another which he did not have. Therefore, the heirs of Mason had not the right to eject the Todds or their successors in title, and if they had not the right they could not convey it to the plaintiffs.

The plaintiffs, I think, must fail on this ground as well as on that of the Statute of Limitations. I think the appeal should be dismissed with costs.

*Appeal dismissed with costs.*

## SHARPE v. CANADIAN PACIFIC R. CO.

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*Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. March 15, 1915.*

1. MASTER AND SERVANT (§ II A 4—80)—INJURIES TO WORKMAN RETURNING FROM WORK—LIABILITY OF RAILWAY COMPANY.

A railway company is not responsible for the injuries sustained by its workmen while returning from work under the direction of their foreman to the sleeping accommodations provided by the company, since such injuries are not those arising in the course of their employment.

[*Sharpe v. C.P.R. Co.*, 19 D.L.R. 889, reversed.]

APPEAL from the judgment of BRITTON, J., 19 D.L.R. 889. Statement

*J. D. Spence*, for appellant company.

*F. D. Kerr*, for plaintiff, respondent.

The judgment of the Court was delivered by

MEREDITH, C.J.O.:—This is an appeal by the defendant the Canadian Pacific Railway Company from the judgment, dated the 2nd November, 1914, which was directed to be entered by Britton, J., on the findings of the jury, at the trial before him at Peterborough on the 14th and 15th September, 1914. Meredith, C.J.O.

The action is brought under the Fatal Accidents Act, to recover damages for the death of Thomas L. Sharpe, which occurred under circumstances which, according to the contention of the respondent, entitle him to recover damages under the Act.

The deceased was an employee of the appellant, and on the day upon which he met his death had been engaged, under the charge of a foreman named Brinker, in the performance of his duties at Welland. The work there having been completed, the foreman, the deceased, and three of his fellow-employees who had been engaged in the work, returned by train to Hamilton, and arrived there shortly before nine o'clock in the evening. Their destination was a car upon the appellant's line in Hamilton, in which they slept and kept their working tools. When the party reached the Hamilton station, they went to take a car on the street railway by which they would have reached a point near the sleeping-car. Finding that the car they expected to take had already left, they decided to get to the sleeping-car by walking along the railway track. The deceased was a compara-

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tive stranger in Hamilton, and it was not shewn, at all events clearly, that he knew that the sleeping-car could be reached by the street car line or that it had been the intention of his companions to have taken passage by the street car.

The deceased was paid for his work by the hour, and his right to be paid his wages came to an end when the work at Welland was completed, or at all events when he had got back to Hamilton.

While proceeding along the railway track, the deceased was struck by an engine of the Toronto Hamilton and Buffalo Railway Company, which was proceeding in the direction in which he was going, and came up behind him, and he died as the result of the injuries he thus received.

These facts are not in dispute, and it is contended by the appellant that it is not liable because the deceased was a trespasser on the tracks of the railway, to whom neither the appellant nor the other railway company owed any duty except the duty of not knowingly or intentionally injuring him; or that, in the view of the case most favourable to the respondent, the deceased was a mere licensee, and took the risk incidental to the carrying on of the operations of the railway company.

It was argued on behalf of the respondent that the deceased met his death in the course of his employment, and that his injury was caused by reason of the negligence of the foreman, with whose orders or directions the deceased at the time of the injury was bound to conform and did conform, and that the injury resulted from his having so conformed; and that was the view apparently taken by the jury. The jury found, in answer to questions, as follows:—

(3) Were the defendants the Canadian Pacific Railway Company guilty of any negligence which contributed to the death of Thomas L. Sharpe? A. Yes.

(4) If so, what was that negligence? A. Allowing their workmen to walk the tracks to boarding-car.

(5) Was the user of the track and right of way of the defendant the Toronto Hamilton and Buffalo Railway Company by the workmen and repair-men of the Canadian Pacific Rail-

way Company known to and acquiesced in by the Canadian Pacific Railway Company? A. Yes.

(7) Was the deceased, at the time of the accident, in the employ of the Canadian Pacific Railway Company? A. Yes.

(8) Was the deceased, at the time of his death, under the direction and control, as to his work and return to the sleeping-car, of Fred. Brinker? A. Yes, until the tools were placed in car.

(9) Was Fred. Brinker, at the time of the accident, a person in the employ of the Canadian Pacific Railway Company to whose orders the deceased was bound to conform? A. Yes.

(10) In starting for the sleeping-car, on the night of the accident, did the deceased Thomas L. Sharpe conform to the orders and direction of Fred. Brinker? A. By his presence he was directed.

There was, in my opinion, no evidence to support these findings. The deceased's injury was not sustained in the course of his employment. When his work at Welland was done, his work for the day had come to an end, and he was no longer subject or bound to conform to the orders or directions of the foreman. Indeed there was no evidence that the foreman gave or assumed to give him any order or direction to proceed along the track to the sleeping-car. The case was simply this: the foreman and the men who had been working with him were proceeding homeward after their day's work was done, and they took what they apparently thought was, in the circumstances, the most convenient way to reach the sleeping-car.

It was argued by Mr. Kerr that it was the duty of the deceased to take to and leave at the sleeping-car the tools he had been using at Welland, and that until he had done that he was still under the direction of the foreman; but, granting that this was his duty, there was no evidence to support the conclusion that until that was done the deceased was still subject to the order or direction of the foreman.

In *Holness* v. *Mackay & Davis*, [1899] 2 Q.B. 319, the facts were that a firm of contractors, under a contract with a railway company for the widening of its line, were ballasting a siding

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which was separated from the main line by several lines of rail. The siding could only be reached by walking for a considerable distance through the premises of the railway company, and the workmen were advised by the contractors, with the authority of the railway company, to enter the premises by a gate, from which a path led by the side of the railway to the siding which was being ballasted; it was not necessary, while following this route, to go upon the main line. On a foggy morning, seven minutes before the hour for the commencement of the day's work, a workman in the employ of the contractors, while on his way to work at the siding, was run over and killed on the main line about 150 yards from the locality of his work; and it was held by the Court of Appeal that it was no part of the contract of employment that the employment should include the time taken in getting to and from the work, that under the circumstances the contractors owed no duty to the workman while proceeding to his work, and that therefore the accident did not arise out of and in the course of the employment of the workman within the meaning of sec. 1, sub-sec. 1, of the Workmen's Compensation Act, 1897.

There were in that case circumstances which made it stronger for the workman than in this case, and it follows from the decision that the result would have been the same if the workman had been returning home after his day's work was done.

*Kelly* v. *Owners of the Ship "Foam Queen"* (1910), 3 B.W.C.C. 113, is a decision upon the same line, though in that case the workman met with his injury when he was returning after a week's end holiday to rejoin his vessel.

In *Walters* v. *Staveley Coal and Iron Co. Limited* (1910-11), 4 B.W.C.C. 89, 303, a miner, proceeding to his work along a footpath prepared by the employers for the workmen's convenience, at a point about a mile away from the place of employment, slipped on some steps known to the employers to be dangerous, and was injured, and it was held that the accident did not happen "in the course of" the man's employment. The observations of Lord Shaw and Lord Robson, pp. 305, 306, are particularly apposite to the facts of this case.

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*Beckerton v. Canadian Pacific R.W. Co.* (1914), 6 O.W.N. 158, 7 O.W.N. 51, may also be referred to.

Having come to the conclusion that the deceased did not meet with his injury in the course of his employment, it is unnecessary for me to consider whether, if an opposite conclusion had been reached, and it had properly been found that the deceased met with his injury while conforming to an order of the foreman to which he was bound to conform, it could properly be found that his injury was the result of the negligent order and of the deceased having conformed to it—a finding which would be necessary to entitle the respondent to recover.

I would allow the appeal, reverse the judgment of the learned trial Judge, and substitute for it a judgment dismissing the action, the whole with costs if costs are asked.

*Appeal allowed.*

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## "A. L. SMITH" and "CHINOOK" v. THE ONTARIO GRAVEL FREIGHTING CO.

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*Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Davies, Idington, Duff, and Anglin, JJ. February 2, 1915.*

1. SHIPPING (§ II—5)—TUG AND BARGE—COMMON OWNERSHIP—COLLISION—LIABILITY OF SHIPS.

A tug having in tow a barge being engaged in the business of their common owner, and controlled by the officers and crew of the tug are regarded as one ship and each liable for the consequences of a collision by the tug with another barge.

[*Ont. Gravel Freighting Co.* v. *The "A. L. Smith,"* 22 D.L.R. 488, 15 Can. Ex. 111, affirmed.]

2. ADMIRALTY (§ I—2)—JURISDICTION OF CANADIAN COURTS—FOREIGN SHIPS—COLLISION IN FOREIGN WATERS.

A proceeding in an American court for the limitation of liability of ships of American registry, for the consequences of a collision in American waters, does not oust the jurisdiction of the Canadian courts to proceed in an action *in rem* upon a subsequent seizure of the ships in Canadian waters.

[*Ont. Gravel Freighting Co.* v. *The "A. L. Smith,"* 22 D.L.R. 488, 15 Can. Ex. 111, affirmed.]

3. ADMIRALTY (§ I—4b)—JURISDICTION OVER PERSON—APPEARANCE—CONTESTING LIABILITY.

Where owners appear and contest the liability of ships they become parties to the action and subject to have personal judgment pronounced against them for the amount of damages properly recoverable for the negligence of their servants.

[*Ont. Gravel Freighting Co.* v. *The "A. L. Smith,"* 22 D.L.R. 488, 15 Can. Ex. 111, affirmed.]

4. ADMIRALTY (§ II—12)—LIMITATION OF LIABILITY—NECESSITY OF PLEADING.

There is no right to a limitation of liability under American or Canadian statutes, if not pleaded nor any evidence of it produced.

[*Ont. Gravel Freighting Co.* v. *The "A. L. Smith,"* 22 D.L.R. 488, 15 Can. Ex. 111, affirmed.]

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APPEAL from the judgment of the Exchequer Court of Canada, Toronto Admiralty District, *Ont. Gravel Freighting Co.* v. *The "A. L. Smith,"* 22 D.L.R. 488.

*A. R. Bartlett*, for the appellants.

*Rodd*, for the respondents.

SIR CHARLES FITZPATRICK, C.J.:—It seems now to be accepted as settled law that for all purposes of their joint navigation a tug and tow are one ship in contemplation of law (*vide The "Niobe,"* [1891] A.C. 401), and that in an ordinary contract of towage a tug is under the control of the tow and must usually obey the direction given her by those in charge of the tow (*The "Robert Dixon"* (1879), 5 P.D. 54), but no general rule can be laid down on the subject. Each case must be decided upon its own facts (*The "Quickstep"* (1890), 15 P.D. 196, at p. 200). It would appear, however, that where the governing power and the navigation are wholly in the vessel towing, the tow is not responsible for the tug's negligence. Compare *Steamer "Devonshire"* v. *Barge "Leslie,"* [1912] A.C. 634; *The W. H. No. 1 and the "Knight Errant,"* [1911] A.C. 30.

There can be no doubt that the circumstances of this case are quite exceptional. This is not a case of towage for hire nor is it a salvage case. Both the defendant ships belong to the same owners and were at the time of the collision being jointly navigated for their benefit by the same crew. The servants of the owners on board the tug had possession and control of the tow by their authority. It is true that the governing power and the navigation were in the hands of the tug, but the carrying capacity upon which the profit of their joint exploitation depended was in the tow.

For the purpose of economy or expediency the tow was fastened to the tug in such a way as to constitute both a danger to other vessels navigating the same waters. Upon what principle of law or reason can the owner of the tow escape liability in the case of a collision attributable immediately to the tug and mediately to the tow? The tug came directly into contact with the barge "Hustler" and caused the damage. And we are all agreed that she is liable. But I think it is very satisfactorily established on the evidence that the collision is attributable to the defective steering of the "Smith," due (*a*) to the condition

in which the barge was by reason of the absence of proper ballast; (*b*) the absence of a bridle and the short tow line used to keep the boats together. There was a steering gear on board the tow, but it was not in use and her movements were directed by the tug, hence the necessity for the short tow line, which latter embarrassed the movements of the tug and caused the sheering which in part at least contributed to the collision. In those facts we have the defective steering of the tug—due to the tow—and the collision in the relation of cause and effect. Captain Allen, of the "Smith," explains that the steering apparatus of the "Chinook" was not in use and that the short tow line was preferable to a bridle for steering purposes. He also admits that the tow would affect the steering of the tug, not to the extent proved by the witnesses on the other side, but sufficiently to cause her to sheer four or five feet. On the other hand, the libellant's witnesses say (Heddrich) the sheer might be about twenty feet. Hunter says

> that the tug was tripped with the scow, that the bow of the scow was holding the stern of the tug,

and he also says, at other places in his examination and cross-examination, that this was the result of using the short line, and in that condition may be found the explanation, in part at least, of the collision. I cannot on the facts come to any other conclusion than that the tug must be considered as being in the service of the tow and identified with her for many purposes. It is quite true that the trial Judge finds the "Smith" solely to blame, but that finding must be read in connection with his previous statement as to the way in which the sheering of the "Smith" was affected by the "Chinook."

I have not, of course, overlooked the observation made in *The "American" and The "Syria,"* L.R. 6 P.C. 127, that the question of liability is not affected because the tug and tow are the property of the same owners. But that case is on the facts so clearly distinguishable from this that I do not think undue importance should be attached to what their Lordships said in that connection. To create in a case of collision a maritime lien enforceable by a proceeding *in rem* the damage must be done mediately or immediately by the ship proceeded against: *Currie* v. *M'Knight*, [1897] A.C. 97; otherwise the fact of mere physical connection or of joint ownership does not create or

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affect liability, and that is all that is decided in *The "American" and The "Syria,"* L.R. 6 P.C. 127. In that case the master of the "American" appears to have undertaken to tow the "Syria" under circumstances quite exceptional, which are fully explained in the report at p. 133. Here we have two vessels necessarily connected for the purpose of the particular business in which both were engaged for the benefit of their common owner and both in the possession and under the control of the same crew for all the purposes of their navigation. As a result of the way in which that navigation was carried on, a collision occurred to which both vessels contributed. I fail to see how we can distinguish between the vessels.

A question arises out of the proceedings taken in the Courts of the United States to limit liability which, in view of the conclusion to which I have come, I am relieved from the necessity of deciding. I may, however, observe that the proceeding instituted in the foreign Court was not a bar to the jurisdiction of the Courts of this country, nor did it operate as a stay of the proceedings unless based on an admission of liability. It is not necessary, of course, in this country, that the owner should admit liability before beginning the limitation proceedings, but liability must be admitted before a decree can be obtained (26 Hals. 616, No. 971, and cases there cited). Those who are interested in this branch of the case will find *Jenkins* v. *Great Central R. Co.* (1912), Shipping Gazette, January 13, C.A., instructive (26 Hals. 614, n.). See also Albany Law Journal.

Idington, J.

IDINGTON, J.:—The appellant tug "Smith" and tow "Chinook" both belonged to the same owners and by the fault of the "Smith" damage was done to the respondent. Both were arrested at Windsor and released upon a bond to answer for one or either to the amount of $12,000, which, if not paid by the owners, would be paid by the guarantor.

The defence set up in the pleadings does not seem to have contemplated raising any other question than, first, that of the fact as to which of the two parties in litigation was to blame for the accident, and, secondly, that the Court, by reason of the proceedings which had been taken in the American Court (and are still pending), was ousted of its jurisdiction.

The latter contention seems in law quite untenable. And

the former and only other question raised seems rightly disposed of by the judgment unless there is room for discriminating between the tug and tow.

But, again, is that discrimination now open to the appellant? As already pointed out, no such question was raised at the trial. So little attention was paid to it that the mate of the tug, in giving evidence, said he did not know whether they had any steering apparatus on the "Chinook" or not.

Another witness, the chief engineer, refers to his having passed from the tug to the tow a few minutes before the collision, to do some work in the engine room of the "Chinook," where there evidently were a number of others.

The effect of the manner in which the tug and tow were connected and the possible bearing thereof on the navigation of either was referred to by more than one witness.

But as to the actual relations at the time in question of the crew on the tow or part of the crew on either vessel to the other or to the management (if there was any) of the navigation of the tug and tow, the evidence presented gives us nothing tangible upon which to form any judgment whereby to discriminate in law between the vessels in relation to the liability for the collision. We find the mate of the tug seems to have been in charge till he called the captain from his bed just five seconds before the collision.

The truth would seem to be that the parties concerned for the defence seemed to have made up their minds that, unless the excuses furnished by the mate or blame sought to be imputed to the plaintiff relieved defendant from all liability, the inevitable consequences of meeting the damages must be faced.

In such a case does the doctrine as expounded in *The "Devonian,"* [1901] P. 221, for example, that tug and tow must be considered as one ship, apply?

The principle that the tow has charge of the governing power would (*primâ facie*, as it were), in the absence of countervailing facts or circumstances, seem to render that doctrine applicable and both liable, as found by the learned trial Judge.

There are numerous cases where the facts and circumstances have enabled the Courts to see their way to set aside the operation of this principle or that doctrine and treat either vessel as solely to blame. I can, however, find no case where the tug

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and tow belonged to same parties and, as here, no facts or circumstances countervailing the operation of the said principles where a collision took place with a third vessel. The case of *The "American" and The "Syria,"* L.R. 6 P.C. 127, relied upon is clearly distinguishable.

The case of *The "American" and The "Syria,"* L.R. 6 P.C. 127, was a case of salvage, and rested upon the principle that must govern such a case, and, besides the question of the salvage of the cargo, so bore thereon as to prevent the identification. In *The "Quickstep,"* 15 P.D. 196, the tug and tow were each respectively owned by different owners and otherwise distinguishable.

The mere act or neglect of duty which was primarily the cause of the collision, no doubt, was as clearly traceable here to the man in charge of the tug as it was in the case of the tug towing the "Sinquisi," which was held merely because a tow liable for the mistake made by the tug. That case seems a stronger application of the doctrine than this, because the tow was, in fact, in that case in charge of a pilot.

Then, in the case of *The "Englishman" and The "Australia,"* [1894] P. 239, the sole fault of the tow was negative in its neglect to assert its authority and insist on a reduction of the rate of speed in a fog which led to the accident.

That and other cases shew how, on the trial, when tug or tow desire to sever the presumed joint responsibility, it is done by issues in the way of pleading, or otherwise raising the question, and evidence being directed thereby to enable the Court to distinguish on the facts that which is thus presented from that which in principle must, at least *primâ facie*, be presumed to render tug and tow identical.

*The "Niobe,"* 13 P.D. 55, is another illustration of how this is brought about and shews that the want of a lookout on the tow was held a fault.

The case of the tow being an absolutely dead barge, without men or machinery on board, or possibility thereof, any more than on a dead log, might be distinguishable from the general rule of presumed liability of the tow.

Even that must depend upon evidence, if not pleading and evidence. Here we have mere accidental glimpses of the con-

dition of things, which shew this tow was very far from being that sort of thing, whatever she was.

The absence of the operative facts of hirer and hired upon which the principles I have adverted to were originally founded and acted upon may make the doctrine look here like a fiction of law. Yet I think it has so much more of common sense to support it than many such useful fictions of law that I must abide by it.

And as to the measure of damages being limited by statute either of the United States or in force in this country, I do not see how that question can be raised here without pleading or evidence to let it in and without having been raised in the Court below.

It certainly seems a remarkably bold attempt.

The evidence of the foreign law is all that was presented to the Court which gives the slightest indication of such a question being raised, and that does not, for it was very properly directed and confined to what would enable the question of jurisdiction raised in the pleadings to be tried out and disposed of. And, curiously enough, in light of present argument, no evidence was directed as to what the foreign law is as to the relation between tug and tow in reference to joint responsibility. When it came to a question of what was to be the measure of damages or limitation thereof, there was no evidence offered. And as I conceive the situation, that was quite proper.

When it comes to be a question under the formal judgment directing a reference of how much damages are to be assessed, the rule of law, whatever it is, will possibly have to be observed. It may be confined to the value of the *res* or it may be found that the form of bail bond, which is not to return the vessels, but to answer for damages which the owners are responsible for and the appearance of the owners thus ensured may have to be considered as enlarging the scope of the inquiry by engrafting upon the suit *in rem* the possible liability of the owners at common law. In the latter case, the view taken in *The "Dictator,"* [1892] P. 304, where all the authorities are reviewed, may have to be considered. As to all this I express no opinion beyond this, that neither the course of the proceedings below nor the form of judgment of record permits of our interfering therewith.

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I have looked into a great many cases besides these I refer to and others that the counsel cited, but I am unable to find anything that would maintain a reversal of the judgment below, under the facts and said course of proceedings and record.

I, therefore, think the appeal should be dismissed with costs.

DUFF, J.:—I have come to the conclusion that this appeal should be dismissed. In order to explain the reasons which have led me to that conclusion, it is necessary to discuss the course of the proceedings in the Court below. The collision took place in American territorial waters—that is to say, in the St. Clair River within American territory. The "A. L. Smith" and the "Chinook," the appellant ships, are both American ships. The action out of which this appeal arises was commenced on April 14, 1913, in the Exchequer Court of Canada (Toronto Admiralty District), by writ of summons, the Ontario Gravel Freighting Co., Ltd., being plaintiffs, and the ships "A. L. Smith" and "Chinook" being defendants. On May 12, the ships were arrested in Canadian waters, and on May 13, 1913, by order of the Court, the ships were released, on bail by the United States Fidelity and Guaranty Co., the company, in its bond, submitting itself to the jurisdiction of the Court, and consenting

> that if Jacques and Son, owners of the vessels "A. L. Smith" and "Chinook," seized by the sheriff in the County of Essex, in this action, and for whom bail is to be given, shall not pay what may be adjudged against them or said vessels or either of said vessels in the above named action with costs, execution may issue against us, the said United States Fidelity and Guaranty Company its goods and chattels, for a sum not exceeding $12,000.

The owners of the appellant ships appeared and defended the action, denying liability and setting up the following special defence (in par. 9):—

> It is submitted that the defendant vessels being American vessels and the accident having occurred wholly in American waters and proper steps having been taken to appraise defendant vessels and fix the amount of liability attaching to them in the District Court of the United States for the Eastern District of Michigan, Southern Division in Admiralty, this honourable court has no jurisdiction to entertain or try this action.

At the trial the parties directed their evidence to a single issue of fact, that, namely, whether the collision was due to the fault of the officers of the "A. L. Smith," wholly or in part, who admittedly were also the officers in charge of the "Chinook" and admittedly were the servants of their owners for whose

negligence, if any, the owners were responsible personally. That issue of fact was decided by the learned trial Judge against the appellants, the collision having been found to have been wholly due to the fault of the officers in question. It is important to note that the defendants did not, by their pleadings, allege that they were entitled by law to have their liability limited under any English or Canadian statute. Nor was any suggestion to such effect made at the trial. Neither was it suggested at the trial (and there is no suggestion of this on the pleadings either), that they were entitled in this action to have their liability limited by the putting into effect in these proceedings of certain provisions on the subject of limitation of liability in certain statutes of the United States of which evidence was given, and to which it will be necessary hereafter to refer. The defendants did, however, at the trial rely upon the defence set up in par. 9 of the statement of defence above quoted. At the opening of the trial, counsel for the appellants addressed the Court as follows:—

*Mr. Ellis:* You will notice we raise the question of jurisdiction. The accident is alleged by us to have happened entirely in American waters, and would undoubtedly be wholly in the jurisdiction of the American courts. They have, as a matter of fact, taken it up over there, and the liability has been limited. Two deaths occurred as a result of this accident. Now, the amount may be limited, and it has been fixed, I believe, at $1,500, and that is available for all American creditors, and it seems to me it is in direct contravention of the rights of the American courts for these parties to come in here, and seize these boats and claim complete jurisdiction. It means these plaintiffs are claiming that these boats are liable here for a greater amount perhaps than has been fixed by the American courts. Bonds were filed in the American courts holding the boat liable for $1,500 to answer for these deaths and all damages, which would of course be an insufficient amount to meet the damages. Now, under the comity of nations can these creditors step in and take away the assets which are insufficient for the American creditors, and say the boats may be sold and disposed of to answer this damage to these Canadian boats, which when the accident happened were foreign boats?

Later counsel for the appellants put the point more specifically:—

*Mr. Ellis:* I submit that it does, for this reason, that if the law is administered over there it will be administered according to the limitation of the vessels in that action. The accident occurred in American waters, and they were American boats, and if they have jurisdiction to limit the amount and divide the funds that are available either by the sale of the vessels or otherwise, then I submit that this court cannot deal with it, that it would interfere with the administration over there. Now, in order

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to shew it does interfere with the administration over there and that is a law that should not be disregarded by this friendly nation—if, as I say, the law over there would give these people only a limited sum then they cannot take the very assets that are available to those people under the laws of that friendly nation, take that vessel away and distribute the funds amongst the foreign creditors. Now, that is a reason why the question of jurisdiction should be decided, and why we should not attempt to take out of the other jurisdiction such an action as this.

I reproduce these extracts from the record to make it clear beyond dispute that, not only in the statement of defence (see par. 9 quoted above), but orally at the trial, the appellants put forward the proceedings in United States Courts for the sole purpose of supporting an exception to the jurisdiction. To establish the plea to the jurisdiction, evidence was given by a gentleman who is a proctor in Admiralty in the United States. In substance his testimony is to the effect that the owners of vessels involved in a collision may limit their liability or prospective liability for the fault of those in charge of the navigation by surrendering the vessels in fault or by having the value of it ascertained in accordance with the proper procedure and paying the amount so ascertained into Court or giving security for the payment of it, as the Court may order. At the trial no evidence was offered of any such proceedings in the American Courts. But, some time after the trial, an exemplification was filed by leave of the learned trial Judge, which shews that certain proceedings had been taken. I will discuss those proceedings in a moment. It will be sufficient now to say that, in my judgment, an inspection of the record of them is enough in itself to dispose of the plea to the jurisdiction in support of which it was put forward.

As to the proceedings at the trial, it should further be noted that, on behalf of the appellants, it does not seem to have been disputed that, assuming the plea to jurisdiction to fail and the appellants' servants to be held to have been wholly in fault, full reparation for the damages suffered by reason of the collision was recoverable by the respondents. Having come to the conclusion, as I have just mentioned, that the plea to jurisdiction fails upon grounds which it would be more convenient to specify later, and that the learned Judge's conclusion that the collision is solely attributable to the fault of the officers in charge of the navigation of the appellant ships is the right conclusion (the

learned Judge stating, in his judgment, that the "A. L. Smith" was solely in fault means that, as between that ship and the tug "Moyles," the fault was solely that of the "A. L. Smith"), it follows that the case must, in my opinion, as regards all the issues and contentions presented at the trial, be decided against the appellants.

Mr. Bartlett, however, who appeared as counsel for the appellants, took up entirely fresh ground. And it is necessary to consider the questions which arise when the case is looked at from the point of view of his able and helpful argument. First, he argues the action, being an action *in rem* and the owners having appeared solely for the purpose of contesting the liability of the vessels arrested, the Court could only pronounce judgment against the blameworthy ship, if one only was blameworthy. Secondly, since, as he contends, it results from the facts appearing upon the record that the "Chinook" cannot be held to be in fault, he argues that the proceeding, being a proceeding *in rem* to enforce against the "A. L. Smith" a lien arising out of the negligence of her officers and the consequent harm suffered by the respondents' vessel, the proceedings in the American Courts are a complete answer to the action on the ground that, according to the law of the United States, those proceedings had the effect of entirely discharging any such lien and substituting for the "A. L. Smith" the fund (or security) deposited by the owners.

As applicable to these contentions, I observe, first, that, in my opinion, the effect of the judgment of the Court of Appeal in *The "Gemma,"* [1899] P. 285, and of Sir Francis Jeune in *The "Dictator,"* [1892] P. 304, is that the owners of the appellant ships, by appearing and contesting the liability of the vessels, became parties to the action and subject to have personal judgment pronounced against them in the action for the full amount of damages for which, according to the principles of law appropriate for the decision of the case, they are personally liable. I have read the comments upon these decisions in the introduction to Williams and Bruce, Admiralty Practice, but, whatever view may be taken by a Court competent to reconsider the principles laid down by the Admiralty Courts of England as to Admiralty practice, I think a proper deference to the opinions upon the points in question expressed by the eminent Judges who were responsible for the decisions mentioned requires me to

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follow them. *Primâ facie*, therefore, the appellants are responsible.

Secondly. As to the American proceedings, the contentions of the appellant rest upon the hypothesis that, on the facts before us, the "Chinook" is free from fault. I do not think this contention is open to the appellants for the purpose of sustaining the contentions put forward, or, rather, it is only open in the form of the proposition that the facts proved are so conclusive in favour of the innocence of the "Chinook" that no further available evidence could rebut that conclusion. The "A. L. Smith" and the "Chinook" admittedly had one set of officers—that is to say, the navigation of the "Chinook" was entirely in charge of the officers of the "A. L. Smith." In the pleadings they are referred to as "the officers of the 'Chinook.'" (Pars. 1, 6, and 7 of the statement of defence.) The question of the identity of the "Smith" and the "Chinook" for the purpose of assigning fault is primarily a question of fact (see the authorities discussed below), and if the defendants had intended to rely upon the contention now advanced that the "Smith" was alone to blame, that contention ought to have been put forward at the trial, when all the facts bearing upon the question of identity could have been threshed out. Not having done so, the burden, on appeal, is that just indicated.

Inspection of the proceedings in the United States Courts shews that the petition for limitation of liability does not refer to the fact that the "Chinook" was in tow of the "Smith" at the time of the collision; and that none of the special facts bearing distinctively upon the culpability of the "Chinook" was disclosed. It is a petition to limit the liabilities of the owners of the "Smith" to the value of the "Smith," upon the hypothesis that the "Smith" alone was delinquent. It seems too clear for argument that such proceedings could be no answer to proceedings in the Exchequer Court against the "Chinook," *or against the owners personally* either as supporting a plea to the jurisdiction or otherwise, unless it now appeared that, in fact, the "Chinook" was not at fault. In point of fact, in the paragraph quoted above from the statement of defence (par. 9), it is alleged that the proceedings in the American Courts were proceedings taken to appraise both vessels, and the attention of the Court

below does not appear to have been called during the trial to the fact that this was an error. When some weeks after the trial the exemplification was filed, the real facts were for the first time placed upon the record.

But, in substance, this contention, now advanced by Mr. Bartlett for the first time, fails, in my view, for the reason that the facts, as disclosed at the trial, favour the conclusion of "identity" rather than non-identity of the "Smith" and the "Chinook" for the purpose now in hand. This view is fatal not only to Mr. Bartlett's contention, which was that the American proceedings in themselves afford a defence, but it is also a conclusive answer to suggestions not advanced by him, as, for instance, that in this Court the damages should be limited to the value of the "Smith" or that there should be a stay of proceedings in the Exchequer Court pending the determination of the proceedings in the United States Courts, or that the case should be referred back to the trial Judge to give the appellant an opportunity to offer further evidence as to the effect of the American law.

I assume in favour of the appellants (without expressing an opinion as to the correctness of the assumptions):—

1. That the personal obligation *ex delicto* of the owner of a ship held responsible for a collision is discharged, according to the United States law, by the surrender of the ship or payment of or deposit of security for the amount of her value in limitation of liability proceedings, and that the inchoate lien on the offending ship is thereby extinguished;

2. That such surrender or payment or deposit in such proceedings in the United States Courts would be an answer to this action on the ground that such a discharge would, according to the doctrine of *Phillips* v. *Eyre*, 10 B. & S. 1004, destroy the obligation springing from the delict under the *lex loci delicti commissi*, as well as the lien based upon that obligation; and

3. If the proceedings in the United States Courts had not the effect of discharging the personal obligation—that the obligation *ex delicto* being in substance limited by the law of the *locus delicti commissi* to the payment of the value of the offending *res*, the amount of damages recoverable in the Exchequer Court is also limited by that value.

These assumptions made—the respondents being, for reasons

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already given, entitled to judgment on the issues and contentions presented and investigated at the trial—the appellant (now suggesting for the first time a defence based upon the allegation of fact that the "Chinook" is not implicated in the fault of the officers in charge) must fail unless it necessarily results that the evidence given at the trial is to exculpate the "Chinook"; and that question I proceed to consider.

I emphasize the special nature of the burden upon the appellants in this issue for the reason that, if the issue had been raised at the proper time, some circumstances not without relevancy to it would probably have been proved by explicit evidence which, in the actual state of the record, are matter of inference only.

First, as to the relevant facts. The "A. L. Smith" and the "Chinook" were owned by the same owners and by them were employed in their business, the transport of gravel and sand, as carriers on the St. Clair River and its tributary waters. The tug having no storage space and the barge neither means of propulsion nor apparatus for steering, each was the necessary complement of the other for performing the function of transport. On the occasion of the collision, as usual, the barge, which was then light, was attached by a short line, ten or fifteen feet long, to the tug. The men employed on both tug and barge were under the control of the captain of the tug, who, with his crew, had charge of the navigation of both. They were in fact navigated as a single craft by one crew, who were the servants of the owners of both and expressly employed for that purpose.

The "Smith" appears to have been employed in navigating the "Chinook" for several seasons; and there seems no reason to doubt that, while loading and unloading, as well as when she was in transit, the "Chinook" and her crew (she was equipped with a derrick and crew for loading and unloading) were, as is usual in such cases, under the control of the officers who also were in charge of the "Smith." In a word, in the freight-earning service of this composite body, both component parts, tug and tow, were, for all the purposes of their service, under the control and management of the same set of servants, acting in the execution of their duties as servants of the common master.

As to the law. In these circumstances I think the tug and

barge were, according to the principles of law administered in the Court of Admiralty, a single vessel in intendment of law for the purpose of assigning responsibility for negligent navigation.

The question of the test to be applied in determining whether, in such circumstances, there is constructive identity of tug and tow was discussed in the House of Lords in *The "Devonshire,"* [1912] A.C. 634. Lord Ashbourne, at 648, and Lord Atkinson, at 656, stated that the question is a question of fact, not of law, to be determined in each case on its own circumstances. Lord Halsbury concurred with Lord Atkinson. The Lord Chancellor adopted the rule which had been laid down by Mr. Justice Butt, in delivering the judgment of himself and Sir Jas. Hannan in *The "Quickstep,"* 15 P.D. 196, in which the principle was accepted that had been enunciated by Mr. Justice Clifford in the judgment of the Supreme Court of United States: *Sturgis* v. *Boyer*, 24 How. 110, at 122. The rule is thus stated by Butt, J., at pp. 199 and 200:—

> In all such cases, however, the real question is whether or not the relation of master and servant exists between the defendants, the owners of the vessel towed, and the persons in charge of the navigation of the steam tug. . . . The question whether the crew of the tug are to be regarded as the servants of the owner of the vessel in tow must depend upon the circumstances of each case.

If this could properly be regarded as a quite complete account of the effect of the authorities upon the subject, there would be no difficulty in reaching a conclusion, on the facts above stated, that (to consider the matter from the point of view of Lord Halsbury, Lord Ashbourne and Lord Atkinson) the "Smith" and the "Chinook" were in fact one ship for the purpose of assigning responsibility; and there was indisputably the relationship of master and servant, which, in the view of the Lord Chancellor, appears to be the decisive factor.

It is necessary, however, to consider the decision of the Privy Council in *The "American" and The "Syria,"* L.R. 6 P.C. 127, a decision which was made the foundation of an argument that the liability of the tow only arises where the navigation in the course of which the negligence occurs is under the exclusive control of the tow. I do not think that is the effect of their Lordships' decision. At p. 133 Sir Robt. Collier, in delivering their Lordships' judgment, mentions the circumstances in which the

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master of the "American" undertook to tow the "Syria," both ships having the same owners.

Their Lordships collect (he says) that he determined to take home the "Syria" partly because he thought it his duty to his employers, who owned both vessels, partly with a view to obtain salvage from the owners of the "Syria's" cargo (which he succeeded in doing). There is no evidence of his having been hired by the captain of the "Syria," or having acted in any way under the captain of the "Syria's" control.

His Lordship adds that their Lordships did not think that the fact of the "American" and "Syria" belonging to the same owners affects the question whether or not the "Syria" was to blame.

Their Lordships do seem to decide that the fact of common ownership alone is not sufficient to establish identity by construction of law. But, on the other hand, their Lordships expressly leave outside of the scope of their ruling the case in which, there being a common owner, the actual control is in the towing vessel, and the master of the latter has been hired by the master of the tow for a service which is not a salvage but a towage service. Their Lordships appear to have treated the "American's" service as a salvage rather than as a towage service. No opinion is expressed as to the responsibility of the tow where—as in the case before us—the master of the tug and his crew have entire and exclusive control of both vessels for all purposes and are, as regards the whole operation, acting exclusively in execution of their legal obligations as servants of the common owners, and I think no principle can be deduced from the judgment governing such a case.

The service undertaken by the master of the "American" was a casual service, which he was under no legal duty to perform; the captain of the "Smith" was charged with the duty of managing the "Smith" and the "Chinook" for all the purposes of transport; both, I repeat, being under his control as the essential parts of what was in fact a single composite freight-earning body. These circumstances seem to distinguish this case from *The "American" and "Syria,"* L.R. 6 P.C. 127.

To summarize these reasons for the sake of clearness. The appellants, by appearing and defending the action, became parties, and, as such, subject to have judgment pronounced against them personally for such damages as the respondent should be entitled to recover for the negligence of the appellants' servants, the officers in charge of both the "Smith" and "Chinook." The

sole issue of fact to which the evidence at the trial was directed was whether the collision was ascribable to the fault in whole or in part of these officers. The defence was not raised at the trial that the damages should be limited to the value of the "Smith" on the ground that she alone was in fault and that under the *lex loci delicti commissi* the obligation *ex delicto* could be discharged by paying the value of the ship in fault. The question whether or not the "Chinook" was involved in the fault of the officers in charge of both vessels is a question of fact and could only be decided now adversely to respondents if it appeared that all the facts necessary to a decision of it were before us, or, in other words, that from the facts proved, the necessary conclusion is that the vessels are not identified for the purposes of legal liability. In my opinion that is not the proper conclusion from the facts brought out at the trial.

The plea to the jurisdiction based upon the limitation of liability proceedings in the United States Courts necessarily fails, if for no other reason, on the ground that in those proceedings none of the facts bearing on the question of the culpability of the "Chinook" was disclosed, and the whole proceedings are on the assumption that the "Smith" was admittedly alone to blame, on which ground also must be rejected the argument that those proceedings in themselves constitute an answer to the action.

As to a stay of proceedings or reference back for further evidence, that has never been suggested by any of the parties; and it is self-evident that, in the view above expressed, neither of those courses is now admissible.

DAVIES and ANGLIN, JJ., dissented.

Davies, J.
Anglin, J.

*Appeal dismissed with costs.*

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## STANDARD BANK OF CANADA v. WETTLAUFER.

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*Ontario Supreme Court, Clute, J. March 19, 1915.*

1. BILLS AND NOTES (§ V A—105)—RIGHTS OF TRANSFEREES—CONDITIONAL ACCEPTANCE—KNOWLEDGE OF CONDITIONS.

A bank receiving a bill of exchange before maturity, with knowledge of the conditions as to its acceptance, does not stand in the position of a holder in due course, and can only claim on it by way of equitable assignment.

2. EVIDENCE (§ VI F—541)—PAROL EVIDENCE—CONDITIONAL ACCEPTANCE OF BILL OF EXCHANGE—ADMISSIBILITY.

Parol evidence is admissible to shew, as against a bank standing

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in the position of holder with notice, that the acceptance of a bill of exchange rested upon a consideration that the acceptors are not to be liable unless they were at its maturity indebted to the drawers.

ACTION upon a bill of exchange accepted by the defendants.

*R. S. Robertson*, for plaintiffs.

*George Wilkie*, for defendants.

CLUTE, J.:—The action is brought upon a bill of exchange for $2,500, made by the New Hamburg Manufacturing Company, and drawn upon and accepted by the defendants. The bill was delivered by the New Hamburg Manufacturing Company to the plaintiffs and placed to the company's credit upon an overdrawn account; reducing the same by the amount of the draft, less the discount. The plaintiffs rested their case by putting in the bill of exchange; the signature of the defendants was admitted.

The defendants contend that they are not liable because the draft was accepted by them as accommodation to the New Hamburg Manufacturing Company, and transferred to the plaintiffs without consideration, and was accepted upon the condition that the defendants should not be liable for and would not pay the bill at maturity unless at that date it was found that the defendants were indebted to the New Hamburg Manufacturing Company for the amount of the bill. The plaintiffs deny that the bill was transferred to them upon the terms alleged, and claim that they are holders in due course for value. They further allege that oral evidence tending to prove the allegations of the defendants is inadmissible, inasmuch as it varies the written instrument.

The facts I find to be as follows. The plaintiffs have a branch at New Hamburg, which carried the account of the New Hamburg Manufacturing Company, and at the time the draft was given the account was overdrawn to the extent of over $17,000, and the bank stood to lose a large amount on the account; the company is now in liquidation.

The New Hamburg Manufacturing Company manufactures machinery of different kinds in the village of New Hamburg. For some time prior to the date of the draft, there had been dealings between the defendants and the New Hamburg Manufac-

turing Company—transactions between them by way of purchase by the defendants and as agents for sale—and the defendants allege that, at the time the draft was given, they were not indebted to the New Hamburg Manufacturing Company for any sum whatever, but, on the contrary, the New Hamburg Manufacturing Company was indebted to the defendants in the sum of over $500.

The plaintiffs were pressing the New Hamburg Manufacturing Company for further security, and that company represented to the bank (plaintiffs), which was the fact, that the company had in course of manufacture two machines for the defendants, from whom they expected to receive over $5,000, on the delivery and acceptance of this machinery. The bank urged the company to get a bill accepted by the defendants, and for that purpose Paul Jocker, in the employ of the company, was sent to Toronto. I find that the defendants refused to accept the bill, claiming that the New Hamburg Manufacturing Company was indebted to them; and, after two days, Jocker returned with the bill unaccepted. Thereupon a further interview took place between the bank manager at New Hamburg, Mr. Fox, and some officials of the New Hamburg Manufacturing Company. The bank manager stated that he would undertake that, if the defendants would accept the bill, they should not be called upon for payment unless at its maturity the defendants were indebted to the New Hamburg Manufacturing Company for that amount. Jocker again went to Toronto with this statement, with a view to obtaining the acceptance of the bill. The defendants still refused to accept without calling up the bank agent and ascertaining that he understood the arrangement to be as alleged. This was done; and I find as a fact that the bank manager acquiesced in this arrangement; that is, that if the defendants would accept the bill they would not be called upon for payment unless they were indebted to the New Hamburg Manufacturing Company at its maturity. The evidence as to the fact of such an arrangement being made and acquiesced in by the bank is, I think, beyond all reasonable doubt. The bank manager does not remember it, but it is quite clear that he is not able to deny it; and, while I impute no intention whatever on the part

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of the bank manager to misstate the facts, I think he has forgotten them.

I find, therefore, the issue upon this question of fact in favour of the defendants. The further question remains, whether the evidence as to the conditional acceptance is admissible.

The Bills of Exchange Act, R.S.C. 1906, ch. 119, sec. 55(1), describes an accommodation party to a bill as a person who has signed as drawer, acceptor or endorser, without receiving value therefor, and for the purpose of lending his name for some other person; (2) he is liable on the bill to a holder for value, and it is immaterial whether, when such holder took the bill, he knew such party to be an accommodation party or not. Where value has been given for a bill, the holder is deemed to be a holder for value as regards the acceptor and all parties to the bill who become parties prior to such time; and where the holder of a bill has a lien on it, he is deemed to be a holder for value to the extent of the sum for which he has a lien: sec. 54. A holder in due course is one who has taken a bill, complete and regular on the face of it, under the following conditions: (*a*) that he became the holder of it before it was overdue and without notice of dishonour, if such was the fact; (*b*) that he took the bill in good faith and for value, and at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it; (2) the title of a person who negotiates a bill is defective if obtained by fraud, etc., or when he negotiates it in breach of faith, or under such circumstances as amount to fraud: sec. 56. A "holder in due course" is, in effect, a "*bonâ fide* holder for value without notice." The rights and powers of the holder of a bill are defined by sec. 74: (*c*) where his title is defective, if he negotiates the bill to a holder in due course, that holder obtains a good and complete title to the bill. The contract on a bill is incomplete and revocable until delivery of the instrument in order to give effect thereto: sec. 39. A qualified acceptance in express terms varies the effect of the bill as drawn, and an acceptance is qualified which is (*a*) conditional, that is to say, which makes payment by the acceptor dependent on the fulfilment of a condition therein stated: sec. 38, sub-sec. 3. The qualified acceptance contemplated by the Act is, of course, one

in express terms forming part of the acceptance. The view has been expressed that there may be other cases of qualified acceptance: Byles on Bills, 17th ed., p. 210; *Decroix Verley et Cie.* v. *Meyer & Co. Limited* (1890), 25 Q.B.D. 343, 347, 348.

Sections 40 and 41 of the Act deal with the question of delivery. By sec. 40, in order to be effectual a delivery (*a*) must be made by or under the authority of the party drawing, accepting, or endorsing, as the case may be, and may be shewn (*b*) to have been conditional or for a special purpose only, and not for the purpose of transferring the property in the bill. By sub-sec. 2, if the bill is in the hands of a holder in due course, a valid delivery of the bill by all parties prior to him, is conclusively presumed. By sec. 41, where a bill has passed out of the possession of the drawer, acceptor, or endorser, a valid and unconditional delivery by him is presumed until the contrary is proved.

The law seems to be well settled that the delivery of a bill may be conditional, and that effect will be given to the condition. The question usually is, in such cases whether the person seeking to recover on the bill is a *bonâ fide* holder for value without notice, that is, a holder in due course. See Chalmers on Bills of Exchange, 7th ed., p. 61; *Watson* v. *Russell* (1862), 3 B. & S. 34, affirmed (1864) 5 B. & S. 968; *Clutton* v. *Attenborough & Son*, [1897] A.C. 90. B. makes a note payable to C., who sues him on it. B. can defend himself by shewing that the note was delivered to C. on condition that it was only to operate if he could procure B. to be restored to a certain office, and that B. was not so restored: *Jefferies* v. *Austin* (1726), 1 Stra. 674. C., the holder of a bill, endorses it in blank and hands it to D. on the express condition that he shall forthwith retire certain other bills therewith. He does not do so. D. cannot sue C., and, if he sue the acceptor, the latter may set up a *jus tertii*.

In *Bell* v. *Lord Ingestre* (1848), 12 Q.B. 317, A. sent his acceptances to the holder of some overdue bills for the express purpose of retiring such bills, and on the express condition that the bills should be returnd to him by the next post, which condition was never complied with. It was held that no interest in the acceptances passed. Lord Denman, C.J., said: "It is a singular sort of escrow; for the bills were delivered to the parties who,

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in the event of their performing a certain act, were to be benefited by them. But still I think they were delivered to them as mere trustees, and that the same principle applies." Coleridge, J., said: "Until the condition was performed, no interest was to pass to the transferees." In *Seligmann* v. *Huth* (1877), 37 L.T.R. 488, the defendants held two bills upon the condition precedent that they would accept the plaintiffs' drafts upon themselves; and, the condition having been broken, the plaintiffs were held entitled to recover the proceeds of the two bills which the defendants had wrongfully converted to their own use. In both of these cases the condition appeared in writing by letters accompanying the bills.

Evidence is admissible to shew that a note was given as collateral security for a running account, and what the state of that account is: *Ex p. Twogood* (1812), 19 Ves. 229; *In re Boys* (1870), L.R. 10 Eq. 467.

The result of the cases as to when and to what extent oral evidence may be given is, I think, correctly stated in Chalmers. Oral evidence is inadmissible in any way to contradict or vary the effect of a bill or note; but it is admissible (a) to shew that what purports to be a complete contract has never come into operative existence, (b) to impeach the consideration for the contract (7th ed., p. 62). "Though the terms of a bill or note may not be contradicted by oral evidence, yet, as between immediate parties, effect may be given to a collateral or prior oral agreement by cross-action or counterclaim" (7th ed., p. 65). The question is treated by Byles, 17th ed., p. 122. Referring to the section of the Act as to conditional delivery, the learned author says: "The effect of this provision is not to alter the rule of common law excluding parol evidence to vary a written agreement, but in conformity with the common law it allows, except as against a holder in due course, evidence to be given either that there was no delivery by the defendant with the intention of transferring property in the instrument, as where a bill was endorsed and delivered to be collected on a joint account, or that delivery was subject to the fulfilment of a condition suspending the operation of the instrument, and that the condition has not been fulfilled; in other words, that the instrument was a mere escrow."

Reference is made to the *Jefferies* and *Bell* cases already quoted, and to *Lindley* v. *Lacey* (1864), 34 L.J.C.P. 7. In that case Byles, J., said (p. 9): "There is here a prior agreement relating to a bill of exchange, with which the subsequent written agreement did not, in any way, interfere. The jury found that the defendant bound himself by a distinct oral agreement to take up Chase's bill, and upon this the written contract is wholly silent. *Harris* v. *Rickett* (1859), 4 H. & N. 1, is therefore precisely in point. But, independently of that case, there is a series of cases beginning with *Davis* v. *Jones* (1856), 17 C.B. 625, and *Pym* v. *Campbell* (1856), 6 E. & B. 370, and followed very recently in *Wallis* v. *Littell* (1861), 31 L.J.C.P. 100, in this Court, which shews that evidence may be given of an oral agreement which constitutes a condition on which the performance of the written agreement is to depend; and if evidence may be given of an oral agreement which affects the performance of the written one, surely evidence may be given of a distinct oral agreement upon a matter on which the written contract is silent." See also Chalmers, 7th ed., p. 65.

Oral evidence is admissible to contradict the consideration or value of a bill or note, but not to vary the terms of the instrument: per Alderson, B., in *Foster* v. *Jolly* (1835), 1 C. M. & R. 703. See also *Abbott* v. *Hendricks* (1840), 1 Man. & G. 791; Halsbury's Laws of England, vol. 2, pp. 467, 483; *New London Credit Syndicate* v. *Neale*, [1898] 2 Q.B. 487. As to defective title see Halsbury, vol. 2, pp. 508, 817.

In *Commercial Bank of Windsor* v. *Morrison* (1902), 32 S.C.R. 98, it was held that a promissory note endorsed on the express understanding that it should only be available upon the happening of a certain condition is not binding upon the endorser where the condition has not been fulfilled; *Pym* v. *Campbell*, 6 E. & B. 370, followed. Strong, C.J., said: "The only title that the bank had to the notes in question was through Marshall, its agent, and it is impossible that they can be used by the bank except subject to the terms upon which the notes were delivered to the agent through whom it derived its title. It was known to Marshall that it had been agreed between Morrison and Smith that the notes should be available only upon the condition that

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some other responsible person should become surety. The agent took the notes subject to this condition, and it must be assumed that the bank also agreed to these terms." See also *Herdman* v. *Wheeler*, [1902] 1 K.B. 361.

Mr. Robertson relied upon *Abrey* v. *Crux* (1869), L.R. 5 C.P. 37, and *New London Credit Syndicate* v. *Neale* (*supra*), following *Young* v. *Austen* (1869), L.R. 4 C.P. 553, where it was held that evidence of a contemporaneous oral agreement to renew a bill of exchange was inadmissible, on the ground that its effect would be to contradict the terms of a written instrument. In *Young* v. *Austen* it was held that, as the agreement would not be a defence unless it was in writing, the plea must be considered as alleging a written agreement. In the case of *Abrey* v. *Crux*, to an action by the payee against the drawer of a bill of exchange, payable twelve months after date, the defendant pleaded that he drew the bill and delivered it to the plaintiff for the accommodation of the acceptor and as surety for him; that, at the time the defendant so drew and delivered the bill to the plaintiff, it was agreed between the plaintiff and defendant and the acceptor that the acceptor should deposit with the plaintiff certain securities, to be held by the plaintiff as security for the due payment of the bill, and that, in case the bill should not be duly paid, the plaintiff should sell the securities and apply the proceeds in liquidation of the bill, and that, until the plaintiff should have so sold the securities, the defendant should not be liable to be sued on the bill. The plea averred that the securities were deposited with the plaintiff by the acceptor, but that the plaintiff had not sold, but still held them. It was held, Willes, J., doubting, that oral evidence of the agreement alleged in the bill was not admissible, inasmuch as it contradicted or varied the express written contract on the face of the bill. Willes, J., after pointing out the distinction between this case and *Young* v. *Austen* and that class of cases, said: "I do not see why we should not make a precedent, to meet the circumstances and the merits of the particular case. . . . I do not see why we should not, in a novel case to which no distinct law is applicable, rather follow the justice of the case than strive to bring the case within a principle which will defeat justice. For these reasons, I entertain great doubt,

though I do not feel so strongly on the subject as absolutely to dissent from the judgment of the rest of the Court." Keating, J., said: "I should have been desirous, like my brother Willes, if we could consistently have done so, to decide in favour of the admissibility of this evidence, because it is excluded only by reason of a rigid rule of law laid down for the general benefit of suitors, but which nevertheless in some cases works hardship. As far, however, as I am aware, upon the authorities on the subject of bills of exchange, it has always been laid down as an inflexible rule that you cannot by parol evidence contradict the terms of the written contract, though you may negative the consideration, as between the immediate parties." Brett, J., said: "I agree that the evidence was not admissible, because it did not impeach the consideration for the bill, or shew that it had failed." The report of the case does not state very fully what the facts were beyond the statement in the plea. In the argument H. James, Q.C., said: "There are many authorities to shew that the intention of the parties to a contract may be shewn by a contemporaneous agreement, whether oral or written, provided such contemporaneous agreement does not vary or contradict or operate in defeazance of the contract declared on, but merely suspends the commencement of the obligation;" and referred to *Pym* v. *Campbell* and other cases.

This case, while it has been commented upon (see Byles on Bills, 17th ed., p. 122, and *Stott* v. *Fairlamb* (1883), 52 L.J.Q.B. 420), has not been overruled. Denman, J., in the last case, said: "I have considerable doubt whether that case is intended to go the full length of holding that an agreement to suspend the operation of a note 'payable on demand,' come to by the original parties to such a note, would be inconsistent with the note. There are expressions in the judgments in *Abrey* v. *Crux* upon which an argument to the contrary might be founded. But the case of *Woodbridge* v. *Spooner* (1819), 3 B. & Ald. 233, certainly does go that length, and seems to me to be entirely in point for the plaintiff. So far, then, as the case depends upon the establishment of a parol agreement contemporaneous with the note, to the effect that the note, though on the face of it payable on demand, should not be enforced for three years, I think the

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defendant's case fails, inasmuch as, although the jury have found a parol contract proved, such contract is immaterial and inoperative to contradict the terms of the note." It will be noticed that the note was payable on demand. In the present case the note was payable in 90 days after date. The agreement, therefore, that it should not be paid for three years, one would think, expressly contradicted the terms of the note. Bovill, C.J., in the *Abrey* case, points out (p. 42) that Mr. James in his argument relied mainly upon two authorities, namely, a passage in the judgment of Maule, J., in the Privy Council, in *Castrique* v. *Buttigieg* (1855), 10 Moo. P.C. 94, 108, and the case of *Wallis* v. *Littell;* and that in the *Castrique* case the facts shewed no consideration, and that the ground of the decision in *Wallis* v. *Littell* was, that, upon the facts, the oral agreement set up was not a variation or defeazance of the written agreement declared on, but was merely offered to shew that the written agreement was not to take effect until the happening of a given event.

In my view, that was the effect of the agreement in the present case, namely, that the agreement operated as a suspension of the bill until it was ascertained that there was an indebtedness at the end of the term mentioned in the bill. The principle recognised in *Wallis* v. *Littell* was applied and followed in *Ontario Ladies' College* v. *Kendry* (1905), 10 O.L.R. 324, where it was held, affirming the judgment of the Chancellor, that, where contemporaneously with a written agreement there is an oral agreement that the written agreement is not to take effect until some other event happens, oral evidence is admissible to prove the contemporaneous agreement. See also *Brown* v. *Howland* (1885), 9 O.R. 48, 66, where it was held that there was no infringement of the rule as to the admission of parol evidence, for its effect was not to alter the note, but to shew that the condition upon which it was to become a note had not been performed—quoting Story in part as follows: "A promissory note, like other written contracts not under seal, may be delivered subject to oral agreement that it shall not take effect until a future time, or until something else has been done that the parties have agreed upon; and in such a case the instrument will have no

operation until the condition or agreement has been performed, even if the delivery is made to the other party himself."

In *Long* v. *Smith* (1911), 23 O.L.R. 121, it was held that parol evidence was admissible to prove the existence of a collateral agreement in the nature of a condition upon which the contract set up was entered into by the defendant. Evidence may be given of a prior or a contemporaneous oral agreement which constitutes a condition upon which the performance of the written agreement is to depend. The oral evidence may be such as to affect the performance of the written agreement, by shewing that it is not to be operative until the condition is complied with. *Henderson* v. *Arthur*, [1907] 1 K.B. 10, at p. 12, and *Lindley* v. *Lacey*, 17 C.B.N.S. 578, 587, are specially referred to. See also *Holmes* v. *Kidd* (1858), 28 L.J. Ex. 113.

In the present case, the bank had not only notice of the arrangement, but was a party to it, and the acceptance was only signed upon the distinct understanding that there was to be no liability unless there was an indebtedness from the defendants at maturity of the bill. The bank was, therefore, in no better position than the New Hamburg Manufacturing Company, and was not a holder in due course for value. The bank had no right, in my opinion, to treat the bill as one for discount, nor was it, so far as the evidence shews, any part of the arrangement, so far as the defendants were concerned, that any advances should be made upon the faith of the acceptance. The bank, it is true, passed it through its books, in the form of a discount, and reduced the overdrawn account by so much, but that was a matter of bookkeeping. The bill was never in its hands as a holder for value without notice, under which it might claim payment in disregard of the condition upon which the acceptance was made. It was argued that the transaction as put forward by the defence was improbable because the bank would get no benefit out of it. This view is not correct. There was a very large indebtedness, in addition to the overdrawn account of the New Hamburg Manufacturing Company, to the bank, upon which the bank was likely to lose, as its local manager said, a large amount. The obtaining of this conditional acceptance operated in effect as an equitable assignment, by making the amount of $2,500 become

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payable to the bank upon the acceptance of the machines by the defendants from the New Hamburg Manufacturing Company, and upon the amount due thereon becoming payable by the defendants.

In my view, the oral evidence was admissible to establish the condition upon which the defendants signed the acceptance.

There was some evidence given that there was no indebtedness from the defendants to the New Hamburg Manufacturing Company; but it was agreed that the decision of this question should stand over until the state of accounts was ascertained by the liquidator of the New Hamburg Manufacturing Company.

Judgment, therefore, will not issue until that question is settled. If it be found that there was no indebtedness, the plaintiffs' action should be dismissed with costs. If there was an indebtedness, the judgment should be for the plaintiffs with costs, for the amount of the bill, if so much is due, or such lesser sum as may be found due. (For such reduction see the *Holmes* case, *supra*.)

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## HITCHCOCK v. SYKES.

*Supreme Court of Canada, Sir Charles Fitzpatrick, C.J. Davies, Duff, Anglin, and Brodeur, JJ.*

1. VENDOR AND PURCHASER (§ I E—27)—SALE OF PROPERTY—AGENT—COMMISSION BASIS—AGENT CO-PURCHASER—FAILURE OF VENDOR TO DISCLOSE—FRAUD—RESCISSION OF CONTRACT.

Where the vendor's agent for the sale of property on a commission basis had induced a third party to become his co-purchaser of the property without disclosing to him the agency and commission agreement with the vendors, it is the duty of the vendors, upon learning of the fiduciary relationship existing between their paid agent and his co-purchaser, to inform the co-purchaser of such agency agreement and failure to do so will entitle him to rescission of the purchase agreement, and return of any purchase moneys paid thereunder.

2. PRINCIPAL AND AGENT (§ II C—20)—SALE OF LAND—AGENT TO SELL ON COMMISSION—AGENT CO-PURCHASER—FAILURE TO DISCLOSE AGENCY AGREEMENT—FRAUD.

An agent having entered into an agreement with a vendor to find a purchaser for his property at a certain price, and on a commisison basis, and subsequently entering into a contract with another for the co-purchase of the property with him, is guilty of fraud if he conceals from his co-purchaser the fact that he is to receive such commission.

Statement

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario, 13 D.L.R. 548, reversing the judgment of a Divisional Court, 3 D.L.R. 531, which affirmed the verdict at the trial in favour of the plaintiffs.

*Cline*, for the appellants.

*Kilmer*, for the respondents.

FITZPATRICK, C.J. (dissenting):—I would allow this appeal with costs.

DAVIES, J.:—I concur in the opinion stated by Mr. Justice Anglin.

DUFF, J.:—I have come to the conclusion that this appeal ought to be dismissed with costs. The only point requiring discussion, in my judgment, is whether, because of the dealings between the Hitchcocks and Sykes, the respondent Webster became entitled, on discovering those dealings, to rescind the agreement for sale. The facts and the law have been very fully discussed in the various judgments delivered in the Courts below. I do not think that among the cases cited there is one decision which exactly fits this case. But, when the facts are fully seized, it appears to be well within the principle of the decisions upon the authority of which the Court of Appeal rested its judgment in *Grant* v. *Gold Exploration, etc., Syndicate*, [1900] 1 Q.B. 233. The essential feature of the case, in my view of it, is one which has, perhaps, not been emphasized as much as its importance would justify. It lies, I think, in the letter of March 29, 1910, written by W. R. Hitchcock to Sykes. That letter is as follows:—



Cornwall, Ont., March 29, 1910.

Hiram Sykes, Montreal.

*Dear Sir*,—Enclosed herewith please find map as surveyed and drawn up by Robert B. McKay, M.E., of Cobalt, Ontario. It will give you an idea of the surface work done on the Hitchcok Bros.' silver property, and I may add that since Mr. McKay visited the property in the early part of January last, a large amount of work has been done, principally in stripping veins and trenching on them to a depth from two to eight feet, until native silver, smalltite or nickelite would appear.

LOCATION: The E. ½ of N. ½ Lot 10, Concession 1, Township of Tudhope, consisting of 80 acres, being only about one-half mile from the wharf at the foot of Elk Lake, where all steamboats between Latchford and Elk City may call. The land from the mine to the wharf is level, so that a good wagon road will be inexpensive.

TITLE: The claims were staked by E. H. Hitchcock, and recorded in November, 1909, under his own license. Sufficient work has been done and recorded so that a Crown patent may now be obtained. No option has ever been given on the property, so that the title is clear with E. H. Hitchcock of Elk Lake.

While there is but a few acres of rock shewing above the level ground, I believe the bed rock is not far below the surface of the ground. There appears to be about a dozen well-defined fissure veins running parallel with

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each other through the exposed rock. We have stripped and blasted out rock on only seven of them and find good shewings of native silver in four of them, as well as smaltite, nickelite and a large quantity of Cobalt bloom in all veins opened. The rock formation is partly Gabro and partly fine diabase. In many places the wall rock between the veins is well mineralized with native leaf silver, Argentile and silver sulphides shew freely in many places.

In all my experience in the Cobalt country I have not seen so many large, rich-looking veins in so small a compass. Every vein worked on has the appearance of widening as depth is obtained. First-class timber in abundance is grown on the property.

Practical mining men from all the surrounding country have been to see the property and praise it most highly. I believe it will prove to be richer than anything in the Elk Lake or Gowganda Districts.

We want a syndicate or company to operate it and are agreeable to dispose of 9/10 interests. We must get a substantial payment down of say $20,000 or $25,000, the balance from time to time to suit. As soon as payment is made we will allow the company to start operations as they may see fit. However, a fair percentage of receipts of ore shipped must be placed in bank to secure our final payments.

We have spent a lot of money, and are still spending it and we know we have a genuine silver mine, where silver in large quantities can be bagged without even using a steam plant to mine it.

If you can prevail on any of your friends to join you in a syndicate or company so that mining can be done on a thorough basis early this spring, I feel that the result will be all that you can hope for. You can safely advise your most intimate friend or client to invest their money in this proposition.

Yours truly, HITCHCOCK BROS.,
*per* W. R. Hitchcock.

Pursuant to the suggestions contained in this letter, Sykes approached Webster. The result of his negotiations with Webster was an agreement of partnership, dated April 7, 1910, in which they agreed to buy the property in question and to divide the profits equally between them. The other material facts, in my view of them, are that on April 12 the agreement for sale was entered into and the initial payment made, the agreement contemplating the working of the property by the purchasers; that the commission which it was understood Sykes was to receive for procuring a purchaser on the terms mentioned in the letter of March 29, 1910, was paid to Sykes by the Hitchcocks without the knowledge of Webster, but without any attempt on the part of the Hitchcocks to conceal from Webster the facts touching the commission to be paid to Sykes and without any knowledge or suspicion that Webster was not aware of the facts; that the Hitchcocks were aware that Sykes was a man of no

means, but had had some experience as a mining operator and a promoter of mining companies; that the Hitchcocks were not aware of the agreement of April 10, but they understood that the purchasers were buying and intended to work the property either temporarily or permanently as a joint venture.

On general principles I must say, with great respect, that it appears to me very clear, indeed, when one keeps in view the terms of the letter of March 29 (the existence of which is, in my view of it, the decisive fact of the case), that a duty rested on the Hitchcocks to inform Webster of the fact that they were paying Sykes a commission.

The relationship into which Webster and Sykes had entered, with the knowledge of the Hitchcocks, was one of the class which imposes upon the parties to it reciprocal obligations of good faith and loyalty as regards the common interest in the common venture: *Carter* v. *Horne*, 1 Equity Abridgment 7. Among others, these obligations include the duty of fully disclosing to his co-adventurers any interest one of the parties may have which is in fact adverse to the common interest or which may be of such a character as to give rise to an obvious risk of exposing him to a temptation to fall short of the loyalty he owes to that interest. It was visibly Sykes' duty to inform Webster of the arrangement he had made with the Hitchcocks respecting commission, and for the purpose of determining the rights of the parties in this case it must be taken that the Hitchcocks were aware of the existence of that duty. So far we are really on common ground. It is not disputed either that if, after becoming aware that Sykes and Webster had formed a partnership for the purpose of dealing in mines generally or for the purpose of buying the property in question, the Hitchcocks had approached Sykes and offered to pay him personally a commission upon the purchase of the property by him and his partner, a duty would have rested on the Hitchcocks to disclose this arrangement to Webster. Such a transaction stands, of course, on the same footing as an arrangement by one party to some proposed business to pay the agent of the other party a commission on the completion of the business. The law casts upon the person who deals with the agent in this suspicious and questionable way the burden of seeing that the duty of disclosure is performed at the

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risk, if it be not performed, of becoming implicated in the agent's culpability.

The principle is not a technical one; and it appears to me to apply to the circumstances of this case for these reasons. As the letter of March 29 demonstrates, the Hitchcocks contemplated, when they agreed to pay Sykes a commission for procuring a purchaser, that, for the purpose of bringing about a sale and thereby earning this commission, he should enter into relations of confidence with other persons with whom he was to become associated as purchaser, of such a character as would impose upon him the duty of disclosing to them his existing relations with the Hitchcocks. It cannot, I think, be successfully contended that there is in principle any substantial relevant distinction between a case of that kind and those cases in which the confidential relationship exists before the arrangement for commission is made. The principle has its justification in the necessity of protecting these confidential relationships, and from that point of view there is, in my judgment, no essential distinction between the two classes of cases.

On this ground, therefore (and I wish to make it plain that, for my part, I am deciding this case upon the letter of March 29), I think a duty of disclosure rested upon the Hitchcocks.

As to the authorities, I have only a word to say upon one of them—*Grant* v. *Gold Exploration, etc., Syndicate*, [1900] 1 Q.B. 233.

It is not to be disputed that Lord Justice A. L. Smith puts his judgment on grounds that are not applicable to this case. Neither is it to be disputed that, if the findings of fact discoverable in the judgment of Lord Justice Collins are to be considered the basis of his judgment, then that judgment is not conclusive of the present case; moreover, there is this further distinction —it is an important distinction—between the circumstances in that case and this: Govan was not only intended to promote a company—that is to say, to bring a company into existence for the purpose of purchasing the property that Grant had to sell—but he was, in fact, the managing director of the company, and, as such, himself decided upon and actually concluded the purchase out of which the litigation arose. Here it is admitted that Sykes did not act in a representative capacity in deciding upon

or concluding the bargain with the Hitchcocks; on the contrary, Webster applied his own judgment to the facts and decided for himself.

It may well be doubted, therefore, whether the decision in *Grant* v. *Gold Exploration, etc., Syndicate*, [1900] 1 Q.B. 233, can fairly be held to rule the decision in this case. I am inclined to think it does not. On the other hand, while, as I have said, the opinion above indicated seems to be justified by the principle of the decisions on which their Lordships proceeded in *Grant's Case*, [1900] 1 Q.B. 233, there are observations in the judgment of Lord Justice Collins which are almost literally applicable to the facts of this case.

On this ground, then, I should dismiss the appeal, but I do not think I ought to take leave of the case without referring to another contention advanced by Mr. Kilmer. The contention was this: Sykes's conduct in representing himself as a person standing in the same interest with Webster, coupled with the concealment of his existing relations with the Hitchcocks, was a fraud, in the carrying out of which he was acting as the agent of the Hitchcocks and in respect of which the Hitchcocks are chargeable as the principals of Sykes. The contention was not raised on the pleadings or in the Courts below, or in the respondent's factum, and, I am pretty certain, was advanced by Mr. Kilmer out of deference to observations made from the Bench during the argument of Mr. Cline. After considering it, I do not think there is anything in the point, and, if there were, I do not think it would be open at this stage of the proceedings. I refer to it because I think I am in a sense responsible for the discussion of it and with the object of making it clear that I am not proceeding upon any such ground in dismissing the appeal.

It is not, of course, argued that Sykes was the agent of the Hitchcocks for the selling of the property; he had no authority from them as their representative—that is to say, to bind them by any obligation as to the sale of the property. The arrangement between him and the Hitchcocks was that if he procured a purchaser, at a price named, prepared to buy the property on terms acceptable to the Hitchcocks (indicated in a general way in the letter of March 29) he was to be paid a commission. Generally speaking, an owner of property who agrees to pay a commission to one or more persons for procuring a purchaser does

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not by such an agreement confer any authority upon such persons to enter into any obligation on his behalf. And, in this case, although it was contemplated that Sykes should enter into partnership arrangements with others, it would be vain to argue from any facts in evidence in this case—indeed, it is obviously not so—that it was contemplated between Hitchcock and Sykes that Sykes, in entering into such arrangements, was to have authority to act as the Hitchcock's agent and bind them by the obligations which he should profess to undertake with his co-purchasers. While it was contemplated that Sykes should undertake such obligations, it was never intended that he should assume them on behalf of and as the *alter ego* of the Hitchcocks; as there was no authority in fact, so also was there no ostensible authority, because, of course, Sykes, in all these arrangements, professed to act only for himself.

Then as to the authority of Sykes to make representations on behalf of the vendors and as their agent, Sykes had been promised a commission for the introduction of a purchaser, but he was under no duty to try to procure a purchaser; he was not bound to take a single step to that end. It may be, although I should think it a disputable question, that a person having such an arrangement with the vendor would solely in virtue of that arrangement be possessed of implied authority to make representations as the agent of the vendor in relation to the description or value of the property. In any case such representations made professedly under the authority of the vendor might, of course, be ratified by him and (if brought to his attention while the contract was still *in fieri*) ratification would be manifested by the vendor's proceeding with the contract. But the misrepresentation complained of was not and in the nature of things could not be made professedly as the representation of the vendor, and it was, consequently, incapable in law of ratification by him. If made without antecedent authority, his responsibility for it must rest on some other principle than that of ratification. It seems equally clear that, under such an arrangement as that in question, whatever authority might be implied by law as to representations touching the description and value of the property, no authority could be implied or, apart from special circumstances, inferred by which the commission-earner would be entitled to represent himself as disinterested. Whether the cir-

cumstances of this case would justify the conclusion that Sykes had a general authority which would extend to that class of acts must be, I think, a question of fact. If I had to pass upon that question, in this case, I should say there was no such authority. But the question does not arise, because, if the respondent intended to rest his case upon that ground, he should have done so at a stage of the litigation at which the appellants would have had an opportunity of meeting his allegations under this head. But the difficulties of the contention do not end here. Assuming authority established, the respondent must shew that the fraud was *dans locum contractui*, that he was influenced by it in whole or in part to enter into the contract. That, again, is an allegation which the appellants have had no opportunity to meet. The respondent, it is true, has said that he would not have purchased had he known Sykes' relations with Hitchcock. But the evidence was not directed to the issue now sought to be raised and the appellants have never been called upon to answer it, and we can feel no assurance that we have before us all the evidence bearing upon the issue.

It would, therefore, be contrary to the settled practice of this Court to permit the respondent to raise the point at this stage.

Therefore, there is nothing in this case to which *respondeat superior*, as expounded in the judgment of Lord Macnaghten, in *Lloyd* v. *Grace, Smith & Co.*, [1912] A.C. 716, and the cases therein referred to, can be applied.

Anglin, J.

ANGLIN, J.:—The plaintiffs, vendors of mining property on which $20,000 had been paid on account of the purchase price, $167,000, for default in payment of further instalments of the purchase money, claim in this action possession of the lands freed from liens, etc., and assert the right to retain the $20,000 paid as forfeited under a provision of the agreement. The defendants, Sykes and Webster, are the purchasers. Sykes was the vendors' agent for the sale of the property on a 10% commission basis, and he induced Webster to become his co-purchaser without disclosing to him his agency and commission agreement with the vendors. He received $2,000 as commission on the $20,000, which was, in fact, paid by Webster, who remained unaware of the agency and of the payment of this commission until after

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this action was brought. Webster counterclaims for rescission of the agreement and the repayment of the $20,000 on the ground that the sale was fraudulent as against him, and for damages.

After reviewing the evidence, Hodgins, J.A., summarized it as follows:—

> The fair result of the whole evidence — of which I have extracted only a few of the more important parts — I think is as follows: That the respondents arranged to pay a ten per cent. commission to Sykes to find a purchaser for, or induce his friends to join in purchasing, the mining property; that the respondents agreed that if Sykes purchased himself or induced another to purchase alone or jointly with him, the commission would be paid to Sykes, and in that sense the commission was consciously added to the purchase price; that the respondents knew, before the agreement was signed, that a relationship of partner or joint purchaser existed between Webster and Sykes, and that they were exacting a price from Webster and Sykes that they would not have exacted from Sykes alone; that they did not disclose the fact that they were paying Sykes a commission; and that the appellant did not know of it until September, and until after action brought; and if he had known it he would have declined to purchase.

The plaintiffs obtained judgment by default against Sykes, who had absconded.

The trial Judge upheld the plaintiff's claim and dismissed the counterclaim on the ground that there was no fraud or intentional concealment on the part of the plaintiffs. This judgment was upheld in the Divisional Court, because no "duty was cast on the respondents to disclose . . . to the appellant" that his co-purchaser Sykes was receiving a commission from them on the sale. To hold otherwise, said the learned Chief Justice, would be "to set up an artificial standard of morals." From this judgment Middleton, J., dissented, holding that "the plaintiffs had been guilty of fraud both in morals and in law." In the Appellate Division these judgments were reversed, the Court holding that Sykes was, in fact, the agent of his co-purchaser, Webster; that this relationship was known to the plaintiffs; and that such knowledge imposed on them the duty of assuring themselves that Webster was aware of the arrangement under which Sykes was to receive a commission on the sale. Meredith, J.A., dissented, on grounds similar to those which prevailed in the Divisional Court. He concludes his opinion with this sentence:—

> While willing to be as vicious against vice in any form, as any one can be, I decline to chop off the heads of innocent and useful setting hens on the chance of their really being poisonous serpents.

There is no doubt, upon the evidence, that Webster was induced to become a purchaser by the persuasion and commendations of Sykes, in whom he placed implicit confidence, because he believed their interests to be identical. He has sworn that he would not have purchased had he known that Sykes was, in fact, the vendors' paid agent.

Sykes was admittedly the plaintiffs' agent for sale. Indeed, it was they who suggested to him that he should prevail on some of his friends to join him in purchasing the property. In the course of his employment by the plaintiffs and to further its purpose, he represented to Webster, by his conduct, if not in actual words, that his sole interest was that of a co-purchaser with him. He deliberately and fraudulently concealed the fact that he had another and an adverse interest—that he was to receive a commission from the vendors of which the amount would increase in proportion to the purchase price. When the civil responsibility of the principal for fraud and misrepresentation of his agent, in the course of his employment, is taken into account, the present case is, in my opinion, indistinguishable in principle from one where vendors, knowing that it is necessary for a prospective purchaser to rely on the skill and advice of an expert in regard to the property which he contemplates buying and that he intends to do so, recommend to him and induce him to employ for that purpose, as an independent man, in whose opinion and advice he can place implicit confidence, a person in their own pay whose remuneration is dependent upon a sale being effected and its quantum on the price obtained, and deliberately refrain from disclosing to him that person's relationship with themselves. Sykes's misrepresentation to Webster as to his true position in regard to the transaction with the plaintiffs and his fraudulent concealment of his commission interest occurred in the course of his principals' business and were, at least in part, for his principal's benefit. That a purchaser who bought under such circumstances, in reliance on the advice of the person thus recommended by the vendors and in ignorance of his relations with them, would be entitled, on discovering the facts, to repudiate the transaction is unquestionable. It is not material that Sykes's fraud, since it was committed while he was purporting to act within the scope of his employment, and in the course of the service for which he was engaged, may have been committed

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in his own interest rather than in that of the plaintiffs: *Lloyd* v. *Grace Smith & Co.*, [1912] A.C. 716. For the fraudulent misrepresentations of their agent the plaintiffs were responsible, and on that ground alone the impeached contract cannot stand: *Milburn* v. *Wilson*, 31 Can. S.C.R. 481; 1 Hals. 211.

I also agree with the view taken in the Appellate Division that, on becoming aware of the relationship between Webster and Sykes, as they admittedly did before the contract for the sale was made, knowing that they were paying a commission to Sykes, that he then stood in a fiduciary relation to his co-purchaser, and that his interest was in conflict with his duty in regard to the disclosure to Webster of his claim to a commission, it was the duty of the vendors to have satisfied themselves that Webster was aware of Sykes's relations with them. It does not matter that, when the agreement to pay commission was entered into, Sykes and Webster had not yet come together. Before the contract of sale was made, the plaintiffs knew that Webster was relying on Sykes in the purchase which he was making. They knew he had sent Sykes to examine and report on the property. They knew, or should have known, that it was, or might be, Sykes's interest to conceal his agency for them from Webster, and they should have anticipated that he might have done so; and it was at their peril that they consummated the transaction and paid Sykes his commission without having ascertained that Webster was apprised of the true situation. The principle underlying the decision in *Grant* v. *Gold Exploration*, [1900] 1 Q.B. 233, covers this case. When the agreement to pay a commission was made in that case, the vendor did not know that the agent, Govan, to whom it was promised, stood in a fiduciary relation to the purchasers. But, as Collins, L.J., says, at 247:—

> It is, however, quite sufficient to raise the legal question in this case that he (the vendor) became aware before he agreed to sell to the defendants that Govan had been acting for them in bringing about the sale. The facts are, then, that the vendor and the buyers' agent, known to the vendor to be such, agree upon a price to be paid by the purchaser one-tenth of which is to go into the pocket of the buyers' agent.

See also the judgment of Vaughan Williams, L.J., at pp. 253-4.

Indeed, while I do not rest my judgment on such a finding, from the facts established it would seem to be a legitimate inference that, when closing the transaction with Webster in the solicitor's office at Cornwall, the Hitchcocks were aware that

he was ignorant of the commission to be paid to Sykes and were parties to the concealment of it from him. They knew that the arrangement between Webster and Sykes was that they should become purchasers with equal interests; they knew that Webster was buying in reliance on Sykes's report on the property and for a price which Sykes had fixed with E. H. Hitchcock when he made the inspection; they knew that the $20,000 was being paid by Webster's cheques. Instead of one cheque for $20,000, Webster had brought to Cornwall three marked cheques—one for $15,000, one for $3,000 and one for $2,000—with a very faint hope, which proved illusory, that at the last moment he might possibly secure some reduction in the price of the property. When the agreement of purchase was signed in the solicitor's office, the Hitchcocks took the three cheques. Nothing was said about the fact that $2,000, the exact amount of one of them, was to go to Sykes for commission. When the party left the solicitor's office to go to the bank, Webster dropped off on the way for some unexplained reason. At the bank, instead of handing over Webster's $2,000 cheque to Sykes, two new cheques, each for $1,000, were drawn and given to Sykes, one being signed by E. H. Hitchcock and the other by W. R. Hitchcock. No receipts were taken from Sykes, and the cheques did not state for what they were given. The explanation of this offered by W. R. Hitchcock is that Sykes was in a great hurry to catch a train. Why, if that were the case, Webster's $2,000 cheque was not endorsed and handed over to Sykes either in the solicitor's office or in the bank is not explained. If it was not designed to keep Webster in ignorance as to the commission paid to Sykes, it is difficult to understand why this course was not adopted. There was, in fact, no such hurry as Hitchcock suggests. Of course, if the $2,000 had been paid to Sykes in the solicitor's office, Webster would have known it; if Webster's cheque had been endorsed over to Sykes and put through his bank account, Webster might have learned inconveniently soon of the payment of the commission. It seems to me incredible that the Hitchcocks could have believed that Sykes had told Webster of the commission arrangement. There is no suggestion of any reason why, if Webster was aware of it, he should have allowed Sykes to have the whole benefit of the commission, which would result in his paying

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for the property 10% more than the vendors' actual price—for his one-half share 20% more than Sykes was to pay for his. It is utterly unreasonable to suppose that the Hitchcocks really thought that Webster was consciously entering into a transaction of that kind. That they knew that Sykes was obtaining the commission for his own benefit admits of no doubt. If they thought Webster was ignorant of the commission arrangement (as I think they did), their duty to have informed him of it is indubitable.

But that duty, in my opinion, arose when they obtained knowledge that their paid agent occupied a fiduciary relation in the transaction to his co-purchaser, and failure to discharge it cannot be excused by proving that they believed that Sykes had disclosed the circumstances to Webster: *Grant* v. *Gold Exploration*, [1900] 1 Q.B. 233, at 248, *per* Collins, L.J.

That Webster is entitled to the relief of rescission is clear on the authority of cases such as *Panama and South Pacific Telegraph Co.* v. *India Rubber, etc., Co.*, 10 Ch. App. 515. And it is not an answer that the property was good value for the price paid: *Parker* v. *McKenna*, 10 Ch. App. 96. The Court will not enter on that field of inquiry.

On both these grounds, therefore—because Sykes, as the vendor's agent, was guilty of fraudulent misrepresentation, for which they are responsible, and because they paid a commission to Sykes when they knew him to be Webster's trusted adviser and co-purchaser, without ascertaining that Webster knew that this commission was to be paid—I am of the opinion that the defendant Webster is entitled to succeed on his counterclaim.

The mechanics' liens which were registered against the property have been removed. They present no obstacle to the defendant Webster having this relief. The plaintiffs are in possession of the property. I agree with Hodgins, J.A., that there is not enough in the correspondence to warrant a finding of waiver by Webster of his right to rescind after he became aware of the facts which gave him that right, nor has there been any dealing by him with the property which would amount to ratification of the contract.

In the judgment of the Appellate Division, the plaintiffs' rights in regard to protection of the shaft sunk on the property

by the defendants, or their assignee, and in regard to the ore taken from it, are carefully provided for.

I would dismiss the appeal with costs.

BRODEUR, J.:—It is with a great deal of hesitation that I have come to the conclusion that this appeal should be dismissed.

I was unable to see that the appellants were guilty of fraud, in the ordinary sense of the word, or that they intended to bribe Sykes when he stipulated a commission in their letter of March 29, 1910.

If I may refer to some judgments rendered in mining cases in this country, I see that it is the habit of some who deal in mining operations to become members of syndicates, to play the part of the broker and to receive from the vendor a commission upon the sale to another member of the syndicate.

Every business (says Judge Riddell in a case of *Murray* v. *Craig*, 10 O.W.R. 888) has its own methods and its own code of ethics, and while the method of proceeding spoken of looks odd at first sight there is nothing improper in it, if thoroughly understood by all concerned.

But in this case, however, no such method has been proved as being prevalent in the circles of which the parties formed part, and we have to apply the law as it applies to all persons.

The principle of law and equity is that an agent or a partner shall make no profit to himself out of his employment other than the amount payable to him by his employer or the partnership.

That principle is an exceedingly just one, calculated to secure the observance of good faith between principal and agent or between partners and to prevent the agent sacrificing the interest of the employer and obtaining gain and advantage for himself.

It was found in this case that Sykes, though a partner of Webster and though instructed by the latter to report upon the value of the mining proposition that was offered to them by the appellants, was, however, in their pay, and was, therefore, interested in having the purchase carried out.

It seems to me that this case is, in all respects, similar to the case of *Grant* v. *Gold Exploration*, [1900] 1 Q.B. 233, in which it was stated by Mr. Justice Collins that

if a vendor pays a commission to a buyer's agent in order to secure his help in bringing about the sale, and does not inform the buyer of the fact, he cannot defend the transaction impeached by the buyer, who has in fact had no notice, by proving that he believed that the agent had disclosed the circumstances to his principal.

*Appeal dismissed with costs.*

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S. C.

## PRICE v. FORBES.

*Ontario Supreme Court, Appellate Division, Falconbridge, C.J.K.B., Hodgins, J.A., Latchford, and Kelly, JJ. January 25, 1915.*

1. CONTRACTS (§ IV D—363)—BUILDING CONTRACT—CERTIFICATE OF PERFORMANCE—CONCLUSIVENESS OF.

Where the builder and the architect knew when a progress certificate was be[illegible]ven by the latter that there was nothing due from the owner a[illegible]nat more than the entire value of the work up to that time had already been paid, the architect's certificate is not binding between the builder and the owner.

[*Smallwood* v. *Pow*[illegible]*ll*, 1 O.W.N. 1025, followed; *Hickman* v. *Roberts*, [1913] A.C. 229, referred to.]

2. CONTRACTS (§ IV D—363)—BUILDING CONTRACT—CERTIFICATE OF PERFORMANCE—CONCLUSIVENESS OF—BAD WORK OR MATERIALS—SET-OFF.

Where it is a term of the building contract that payment on any certificate granted by the architect is not to exonerate the contractor from liability for bad material or bad workmanship, such defects are likewise available in defence of an action brought by the contractor to enforce payment of the amount certified by the architect.

Statement

APPEAL by the plaintiff from the judgment of J. A. C. Cameron, an Official Referee.

*M. K. Lennox*, for appellant.

*R. H. Holmes*, for defendant, respondent.

The judgment of the Court was delivered by

Hodgins, J.A.

HODGINS, J.A.:—Mr. Lennox did not attack any of the findings of the Official Referee appearing in the report appealed from, but contended that the appellant was entitled to judgment for the amount of the architect's certificate for $1,400 dated the 3rd June, 1913, which the respondent had refused to pay. He urged that it was conclusive as between the appellant and respondent, no matter whether the respondent had a claim arising out of the non-completion of the work or from its improper performance.

This contention leaves out of sight the meaning of the contract in this case, as well as the effect of the Referee's findings, supplemented as they were by a certificate procured, at the suggestion of the Court, by the parties.

An architect's certificate may be made, by express agreement, final and binding on both the owner and contractor, and in that sense conclusive as between them. But, as pointed out by the judgment of the Court of Appeal in *Smallwood Brothers* v. *Powell*, 1 O.W.N. 1025, that result by no means follows if the

contract itself affords evidence that the certificate is not finally to settle the matters which it deals with, and does not absolve the contractor from responsibility for work badly done or omitted. See also *Watts* v. *McLeay* (1911), 19 W.L.R. 916, and *Contractors Supply Co.* v. *Hyde* (1912), 2 D.L.R. 161.

In this case no payment is to be made except on the architect's certificate "that a certain amount of work has been done to their (*sic*) satisfaction." Payment is to be made "at the rate of 80 per cent. on the value of work executed from time to time, and of the remainder a further 10 per cent. on the certified completion of the work, and the balance of 10 per cent. within six months after the architect has certified that the works are completed to his satisfaction." It is not stated in the architect's certificate here what amount of work has been done; and the finding of the Referee is, that "the amount paid by the defendant on account of the said contract far exceeds the value of the work done and material furnished." This affords a complete answer to the claim; for the appellant is entitled to only 80 per cent. of that value, and he has already received more than 100 per cent. thereof.

Apart from that, however, the certificate is not conclusive. Payment on any certificate is not, by the terms of the specifications, to exonerate the contractor from liability for any defect attributable to bad material or bad workmanship. The Referee found that the material was bad and the work improperly done. If payment of the amount of a certificate forms no bar to the contractor's liability, then, *â fortiori*, the giving of the certificate can put the matter in no better position.

But it is unnecessary to consider this point further, for the report charges the architect with improperly issuing this certificate, and the Referee's later finding states that both the appellant and the architect knew, when the certificate was given, that there was nothing due from the owner: a clear case of fraudulent collusion.

It may be noted that in *Hickman & Co.* v. *Roberts*, [1913] A.C. 229, the House of Lords has decided that improper interference by the building owners with the architect, in forbidding him to issue a certificate, was sufficient in itself to shew that the

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architect had abandoned his attitude of impartiality, and that the obtaining of his certificate was therefore not a condition precedent to recovery of the amount properly due.

I have not considered whether the contract limits the appellant to his commission of 10 per cent. on the cost of erection, and does not go far enough to enable him to demand and receive the cost itself in the way indicated in the specifications.

The appeal should be dismissed with costs, which, however, are not to include the costs of procuring the evidence, in view of the application of the appellant, when launching his appeal, to dispense with it, on the ground that he proposed to argue the case wholly upon the findings of the Referee: a course which he scrupulously pursued.

*Appeal dismissed.*

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MAN.
K. B.

## BERTRAM v. BUILDERS' ASSOCIATION OF NORTH WINNIPEG.

*Manitoba King's Bench, Galt, J. May 14, 1915.*

1. NEGLIGENCE (§ I C 1—44)—DANGEROUS PREMISES—EXCAVATIONS—DUTY AS TO CARE—INDEPENDENT CONTRACTOR.

A man who orders a work to be executed from which, in the natural course of things, injurious consequences to his neighbour must be expected to arise unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing someone else, whether it be the contractor employed to do the work from which the damage arises or some independent person, to do what is necessary to prevent the act he has ordered to be done from becoming wrongful.

[*Bower* v. *Peate*, 1 Q.B.D. 321, followed.]

Statement

ACTION for trespass and for damages.

*G. W. Baker*, K.C., for plaintiff.

*E. R. Levinson*, for defendants.

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GALT, J.:—This action was commenced on May 26, 1914, and two days later the plaintiff obtained an *ex parte* injunction against the defendants restraining them from encroaching upon, injuring, damaging or interfering with the plaintiff's land—namely, lot 295, situate on Selkirk Ave., in Winnipeg. The defendants own lot 296, adjoining the plaintiff's property on the east.

The plaintiff complains that on or before May 1, 1914, and since, the defendants commenced building operations on said lot 296, and have made a large excavation thereon, and have

done the same negligently and without regard to the rights of the plaintiff, and have undermined the plaintiff's land, and have caused part of the plaintiff's land to fall into the said excavation, and have caused the plaintiff's fence to fall down, and have destroyed the same, and have otherwise encroached upon plaintiff's property.

Plaintiff claims: (*a*) $1,000 damages; (*b*) an injunction; (*c*) further and other relief.

The defendants deny the encroachments complained of, and set up, amongst other things, that, in erecting their building upon their own lot they employed skilled contractors to perform the work, and thereby relieved themselves of any liability for the results.

The injunction against the defendants was obtained upon an affidavit made by the plaintiff, verifying the statement of claim and stating, amongst other things:—

4. The said defendants have made an excavation on their said land to the depth of about eight feet up to the line of my land adjoining their said land to the west. This excavation extends alongside my land for about 100 feet. In making this excavation they undermined my land and left the excavation open for some time causing the earth along my land for about 100 feet to fall in, varying in depth from six inches to about two feet in some places. My fence, which was wholly situated on my own land, has fallen down into said excavation and has been destroyed by the defendants.

The injunction was served upon the defendants upon the day it issued. It was expressed to be "until Wednesday, the 3rd day of June, 1914, or until the motion then to be made to continue this injunction shall have been heard and determined." As a matter of fact, it never was formally continued or dissolved.

The evidence given at the trial shewed that the defendants, desiring to erect a large building upon their own property, made the requisite excavation for the foundation, which was to be of concrete. The plaintiff's property was bounded by an old frame fence, erected 14 years ago, the posts of which at one portion at least projected into and upon the defendants' property to the extent of at least two or three inches.

As a matter of fact, the defendants did not undermine the plaintiff's land at all.

When the excavation was being made, the plaintiff caused his solicitors to write a letter, on May 1, 1914, to the defendants

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pointing out the likelihood of injury being caused to the plaintiff's property, and saying:—

> We beg to advise you that unless steps are taken forthwith to protect our client's property from injury, we will require to apply to the Court for an injunction.

The defendants established to my satisfaction that they did take precautions in this respect by erecting supports along the line, but as the foundation progressed towards the top it would be impossible to maintain the supports, and so the fence, which was on the extreme limit of the plaintiff's property, fell in.

From the commencement the plaintiff took the position that he was entitled to have his property and fence maintained just as it was before the excavation took place, and both he and his wife kept a watchful eye upon the defendants' workmen and strenuously objected to any of them entering upon his property in connection with the building operations.

In addition to making the supports above alluded to, the defendants took care not to excavate their ground to the extreme limit, but left a fraction of an inch to spare. Moreover, although the continuation of the old fence by the plaintiff seemed ridiculous, yet the defendants offered to take it down until their building had progressed substantially, and then replace it for the plaintiff, but the plaintiff refused to permit this. It was shewn in evidence that a new fence could have been put up for about $30.

It was natural and unavoidable by the defendants that a certain amount of the plaintiff's land should fall into the defendants' excavation, and it did so to the extent of a depth of two or three feet in certain portions. The defendants had foreseen that this must happen, and they had kept a quantity of good soil for the purpose of replacing any which might fall out of the plaintiff's property, and, after the wall was sufficiently high, the defendants offered to do this filling in for the plaintiff, but he and his wife refused to allow them to come upon the property for the purpose. The amount of earth necessary was shewn to be five or six loads, at a cost of perhaps $4 or $5. It is true that the plaintiff and his wife stated that the defendants were only going to fill up the holes with waste material from the building, such as sand or gravel, etc., but I accept the evidence of the

defendants' witnesses upon this point in preference to that of the plaintiff.

The above statement of facts indicates the extent of the petty dispute which I am called upon to decide.

Insignificant as the facts of this case are, they raise one or two questions of law which are more difficult to decide. Both parties appeared to recognize that the question of costs was really the main question left for adjudication.

The plaintiff claims that, being entitled to an injunction at the time he obtained it, he is now entitled at least to "damages in lieu of an injunction," together with costs on the King's Bench scale, inasmuch as the County Court has no jurisdiction to grant an injunction.

In my opinion, the plaintiff never was entitled to his interim injunction. He obtained it on May 28, 1914, and the evidence given by the defendants established conclusively that their foundation had been erected to the level of the surface on May 23, 1914. Consequently, there was no danger whatever of any further subsidence of the plaintiff's ground or any pretence that the defendants were, in truth, encroaching upon the plaintiff's property. The fence was already down, the boards of which were carefully stacked by the defendants to the rear of the plaintiff's property, in case he required them again. The plaintiff misstated the case to the learned Judge who granted the injunction by stating that the defendants had undermined his property and that the fence was wholly situated on his own land. The plaintiff, therefore, had no equity entitling him to an injunction at the time he obtained it.

Is he entitled now to claim damages "in lieu of an injunction" as distinguished from the ordinary damages, which he also claims?

In *Miguez* v. *Harrison*, 20 D.L.R. 233, 25 Man. L.R. 40, the same question, arising under somewhat different circumstances, was answered by the Court of Appeal in the affirmative. In that case the plaintiff had claimed, (a) specific performance of a contract, (b) a vesting order, (c) in the alternative, $3,157.34 (alleged increase in the value of the land), (d) judgment that the plaintiff do recover from the defendants $160.35, being moneys paid by the plaintiff to the defendants (namely, $141) under said agreement, and legal interest thereon. At the trial, judgment was

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given for the plaintiff for $141 damages, and costs to be taxed. The taxing officer decided that the costs should be taxed on the King's Bench scale. I held, on appeal from the taxing officer, that, having regard to the judgment of Killam, J., in *Cochrane* v. *Harmer*, 3 Man. L.R. 449, for the purposes of taxation the action must be regarded as one simply for $141 damages, and that inasmuch as this was well within the competence of the County Court the costs should be taxed on the County Court scale. On appeal to the Court of Appeal the latter Court held that the damages in question must be regarded as "damages in lieu of specific performance," and inasmuch as a claim for specific performance could not be brought in the County Court the plaintiff was entitled to bring his action in the King's Bench, and should recover his costs accordingly.

The provision in our Act enabling the Court to award damages in lieu of, or in addition to, specific performance or injunction, is simply a reproduction of Lord Cairns' Act. It has always been held in England that a party seeking such damages must shew that he is otherwise entitled to equitable, as distinguished from legal, relief. This is a condition precedent: see *Ferguson* v. *Wilson* (1866), L.R. 2 Ch. 77. The Judicature Act has not altered this requirement: see *White* v. *Boby* (1877), 26 W.R. 133; *Proctor* v. *Bayley* (1889), 42 Ch.D. 390 (C.A.); Hals., vol. 27, sec. 184, n. (*t*).

But in *Miguez* v. *Harrison*, 20 D.L.R. 233, specific performance had become impossible before the commencement of the action—the defendant having conveyed the land to a third person. In such a case a plaintiff does not possess the requisite equity, and so it is not allowable to award damages in lieu of specific performance: see Hals., vol. 27, sec. 105.

The attention of the Court of Appeal was not directed by the learned counsel who argued the case to the line of authorities above mentioned, and I cannot assume that if the attention of the Court had been directed to them the Court would have done otherwise than follow them.

The defendants have always denied any liability whatever to the plaintiff. They contend that by employing skilled contractors to erect the building they have thereby relieved themselves of liability for any damages which may have occurred. This con-

tention cannot be maintained. The law applicable is tersely summed up in *Bower* v. *Peate*, 1 Q.B.D. 321, where Cockburn, C.J., delivering the judgment of the Court, said, at p. 326:—

> A man who orders a work to be executed from which, in the natural course of things, injurious consequences to his neighbour must be expected to arise unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing someone else—whether it be the contractor employed to do the work from which the damage arises or some independent person—to do what is necessary to prevent the act he has ordered to be done from becoming wrongful.

I find upon the evidence that the defendants did take all reasonable precautions in every way to avert any injury or loss to the plaintiff. They offered to take down his fence and replace it again as soon as their building was sufficiently high to do so. They endeavoured to support the plaintiff's land by propping it up, and they offered to fill up all the holes which were made by the plaintiff's earth falling in with equally good earth, but the plaintiff was determined to maintain his strict common law rights to the uttermost.

The administration of justice at the present day is not fettered to the extent it formerly was in awarding damages or costs to people who insist upon their strict legal rights. The trend of modern decisions is well exemplified in *Behrens* v. *Richards* [1905], 2 Ch. 614. As was said by Buckley, J., at p. 619:—

> It is matter for the application of reason, common sense and ordinary forbearance, not for an injunction.

Again, at p. 622:—

> The existing security of the tenure of land in this country is largely maintained by the fact that the owners of the land behave reasonably in the matter of its enjoyment. It would, in my judgment, be a disastrous thing, not for the public only, but for the landowners also, if this Court, at the caprice of the landowner, not because circumstances have altered, but merely because he was minded that it should be so, entertained every trivial application to restrain persons by injunction from using paths which, though not public highways, have in fact been used by the permission of the owners for many generations, and whose user is no injury to the owner of the land.

In the result the learned Judge awarded the plaintiff nominal damages without costs.

In this country, where an adjoining land owner is desirous of erecting a building upon his property, it is inevitable that to a certain extent the workmen will frequently and almost of necessity do acts which in the strict eye of the law are legal trespasses upon

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the adjoining owner; but in such cases one would have supposed that people would have already learned the lesson recognized in the last-quoted case, and would apply their reason, common sense and ordinary forbearance, rather than go to law over trifles.

But the plaintiff's legal right must be recognized if he insists upon it, and he does so, pointing out that along certain portions of the defendants' wall the defendants supported their concrete by inserting thin boards of shiplap and supporting these boards by driving in some wooden supports, 2 in. by 4 in., which projected into the plaintiff's property. The plaintiff also had a legal right to the maintenance of his fence, except in such portions as where it trespassed upon the defendants' land. It is impossible to imagine what useful or ornamental purpose could be effected by an old board fence built right up against a new and substantial building, but if the plaintiff wants it there he is entitled to have it.

To the extent above mentioned the defendants have trespassed upon the plaintiff's property. The outside limit of the damage sustained by the plaintiff is $36, which will cover the cost of a new fence and of filling up the spaces of earth which fell in. He never was entitled to the injunction, nor, for the reasons above given, to damages in lieu of it.

Under all the circumstances of this case I think justice will be done by giving the plaintiff judgment for $36 ordinary damages without costs.

*Judgment for plaintiff.*

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## FOSS v. STERLING LOAN.

*Saskatchewan Supreme Court, Haultain, C.J., Newlands, Lamont, and Brown, JJ. July 15, 1915.*

1. EXECUTION (§ I—8)—EQUITABLE ESTATES—PURCHASER'S INTEREST IN LAND—CAVEATS—LAND TITLES.

The filing of a caveat under sec. 17, ch. 16, of the Land Titles Act (Sask.), on a writ of execution does not bind the unascertained equitable interest of a vendee under an agreement for the sale of lands so as to make it enforceable against the interest in the lands under a transfer subsequently registered.

[*Foss* v. *Sterling Loan*, 21 D.L.R. 755, affirmed.]

Statement

APPEAL from a judgment for defendant, 21 D.L.R. 755.

*T. D. Brown*, for appellant.

*J. A. Allan*, K.C., for respondent.

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The judgment of the Court was delivered by

NEWLANDS, J.:—On April 5, 1912, by an agreement in writing one Frank W. Downing agreed to sell to W. G. Wilmoth the north-west quarter of section 25, township 8, range, 8, west of the 2nd meridian, and the north-east quarter of section 26, in the same township and range, for the sum of $9,600 on the terms therein mentioned. On March 12, 1913, the said Downing assigned to the defendant the lands mentioned in the aforesaid agreement, together with the said agreement and all moneys accruing due thereunder, subject to a prior assignment to the City Investment Co., as security for an advance of $1,500. The evidence does not shew when the defendant became the registered owner of the above lands, but the statement of claim alleges that the defendant was, at the time of the issue of the executions hereinafter referred to, and the registering of the caveat hereinafter referred to, the registered owner of the said lands, and the trial Judge assumed that the defendant became so registered between the assignment to it above referred to and the date of the executions hereinafter referred to. On or about July 11, 1913, the plaintiff recovered judgment in the District Court of the judicial district of Regina against said Wilmoth for the sum of $233.16, which judgment is still in force and unsatisfied. On or shortly after the said July 11, 1913, the plaintiff caused writs of execution against the goods and lands of the said Wilmoth to issue upon the said judgment directed to the sheriff of the judicial district of Cannington, within whose bailiwick the said lands are situated, which said writs were delivered to the said sheriff on or about September 17, 1913; and on or about the said September 17, the sheriff delivered or transmitted to the registrar of the Cannington Land Registration District a copy of the said writ of execution against lands. Said executions are still in force. On or about September 24, 1913, the plaintiff caused to be registered in the office of the registrar of said land registration district against the title to the whole of said lands a caveat under the plaintiff's said writs of execution, which said caveat has continued to be ever since and is still registered against the title to said lands. On or about April 3, 1914, the said Wilmoth was largely indebted to the defendant under the agreement en-

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tered into between the said Downing and the said Wilmoth, and the defendant was pressing the said Wilmoth for payment of same. The said Wilmoth could not pay this money; he had no horses or machinery or seed and could not farm the land; and it was therefore agreed between the said Wilmoth and the defendant that the said Wilmoth should execute to the defendant a quit claim deed of the said Wilmoth's interest in said land. Wilmoth accordingly, on April 3, 1914, executed to the defendant a quit claim deed of the interest of the said Wilmoth in the said land. At the time of the execution of this quit claim deed the defendant credited to the said Wilmoth the sum of $155 on account of the purchase price of another quarter section which the defendant at the same time sold to the said Wilmoth. This land was sold at $1,280 and the contract was made to the wife of the said Wilmoth. The land in question cost $900 and as it was practically prairie land and did not require to be worked, the defendant company thought Wilmoth or his wife might be able to trade it off to somebody else, as Wilmoth was a real estate dealer, and in this way the defendant would probably get its money out of the land. The learned trial Judge accepted the evidence of Mr. Tasker as to the reason this $155 was credited, and found as a matter of fact that it was not credited for the purpose of repaying to Wilmoth any interest or equity that he had in the land, but was solely on account of the fact that the land required to be worked, that Wilmoth was unable to work it, and that in order to induce Wilmoth to execute a quit claim deed and to deliver up possession to the defendant, the defendant agreed to credit him with this $155, but that it was not at all because the defendant thought that Wilmoth's equity in the land was worth anything; in fact, he also found that at the time of the quit claim deed to defendant the land was not worth as much as defendant's claim against the land, and that Wilmoth's equity was not worth anything. On April 16, 1914, the defendant entered into an agreement to sell said land to Thomas and David Crumley for the sum of $8,000, although the consideration was expressed to be $8,001. On or about May 14, 1914, the defendant, who about that time first learned of the plaintiff's caveat, caused the registrar to forward a notice under sec. 130 of the

Land Titles Act to the plaintiff notifying the plaintiff that his caveat would lapse unless an order for continuance of the caveat should be filed. Subsequent proceedings were taken, and this action was commenced on July 15, 1914. In this action, the plaintiff claims from the defendant (1) payment of the amount of the plaintiff's said judgment, with interest and costs; (2) a declaration and order of this honourable Court that the plaintiff's caveat is properly registered against the title to the said lands, and constitutes and has constituted since the date of the registration thereof a valid charge against the whole of the said lands; (3) equitable execution and the appointment of a receiver; (4) at the plaintiff's option an order for the sale of the said lands and the application of the proceeds in payment of the plaintiff's said execution and costs. The learned trial Judge dismissed the plaintiff's action.

From this judgment the plaintiff appealed. The grounds of appeal were briefly as follows: That by virtue of sec. 17 of ch. 16 of the Acts of 1912-13, the sheriff, by filing the writ of execution in the land titles office seized the interest of Wilmoth under the agreement of sale in this land, and that sec. 125 of that Act gave plaintiff the right to file a caveat and that he was entitled to a judgment against defendant either for the amount of his claim or that the lands in question should be sold to satisfy the same.

Sec. 125 of the Land Titles Act provides that any person claiming to be interested in any land under an execution where the execution creditor seeks to affect land in which the execution debtor is interested beneficially, but the title to which is registered in the name of some other person or otherwise, may lodge a caveat, and sec. 17 of ch. 16 of the Acts of 1912-13 provides that a writ of execution against lands when filed in the land titles office

> shall bind and form a lien and charge on all the lands of the execution debtor situate within the judicial district of the sheriff who delivers or transmits such copy as fully and effectually to all intents and purposes as though the said lands were charged in writing by the execution debtor, under his hand and seal,

and sub-sec. 1 of sec. 2 of the Land Titles Act provides that

> "Land" means every estate or interest therein and whether such estate or interest is legal or equitable.

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The learned trial Judge based his decision largely upon the interpretation he gave to the word "lands" as distinguished from the word "land" as interpreted in sub-sec. 1, of sec .2. It is unnecessary for me to discuss the distinction between these words as used in that Act, because I do not think that it is necessary to distinguish between them in order to come to a conclusion in this case.

The effect of an execution against land when registered in the Land Titles Act is provided for in sub-sec. 2, sec. 17 of ch. 16 of the Acts of 1912-13. From the date of filing it is to "bind and be a lien or charge upon the land."

In 14 Hals., p. 42, he says:—

> The writ is said to "bind" the property in the goods of the judgment debtor in the bailiwick. Where it is said that the goods, or the property therein, are "bound" what is meant is that the sheriff acquires a legal right to seize such goods.

Under this interpretation of the word "bind" the section in question would read:—

> Under such writ the sheriff shall have the legal right to seize the lands of the execution debtor and such writ shall form a lien and charge on all the lands of the execution debtor, etc.

This amendment to the Land Titles Act does not therefore affect any lands which the sheriff could not legally seize prior to the passing of it. It does not extend his right to seize lands, but only provides what effect an execution against lands which he could not legally seize before it was passed should have.

The question therefore arises: what is the interest of Wilmoth in the land in question? and next: can the sheriff seize such interest? because he must have the right to seize that interest, before the writ can become a lien or charge upon it.

In *Ridout* v. *Fowler*, [1904] 1 Ch. 658, which was affirmed by the Court of Appeal in, [1904] 2 Ch. 93, Farrell, J., said at p. 661:—

> Now the rights of vendor and purchaser have been explained so often that it is sufficient to refer to what Lord Hatherley says in *Shaw* v. *Foster*, L.R. 5 H.L. 321, 356, where, quoting from his own decision, he says: "It is quite true that authorities may be cited as establishing the proposition that the relation of trustee and *cestui que trust* does, in a certain sense, exist between vendor and purchaser; that is to say, when a man agrees to sell his estate he is trustee of the legal estate for the person who has purchased it, as soon as the contract is completed, but not before." That was

in reference to the actual conveyance. The expression used by Sir Thomas Plumer in *Wall* v. *Bright* (1820), 1 Jac. & W. 494, 503, 21 R.R. 219, 225, is this: "The vendor, therefore, is not a mere trustee; he is in progress towards it, and finally becomes such when the money is paid, and when he is bound to convey." James, L.J., puts it perhaps more clearly in *Rayner* v. *Preston*, 18 Ch. D. 1, 13. He says: "I agree that it is not accurate to call the relation between the vendor and purchaser of an estate under a contract while the contract is *in fieri* the relation of trustee and *cestui que trust*. But that is because it is uncertain whether the contract will or will not be performed, and the character in which the parties stand to one another remains in suspense as long as the contract is *in fieri*. But when the contract is performed by actual conveyance, or performed in everything but the mere formal act of sealing the engrossed deeds, then that completion relates back to the contract, and it is thereby ascertained that the relation was throughout that of trustee and *cestui que trust*. That is to say, it is ascertained that while the legal estate was in the vendor, the beneficial or equitable interest was wholly in the purchaser. And that, in my opinion, is the correct definition of a trust estate." Now here it is quite clear that the relationship of trustee and *cestui que trust* never was created by the completion of the contract, and therefore there never was any estate in land in the events that have happened on which this order by way of equitable execution could have operated. That disposes of the question of any charge upon the real estate, because by reason of the events that have happened and which the plaintiff in the present action could not interfere with or prevent, no actual estate in the land ever belonged to the debtor at all.

And in *Howard* v. *Miller*, 22 D.L.R. 75, [1915] A.C. 318, Lord Parker said, at p. 79:—

It is material to consider what this interest really was. It is sometimes said that under a contract for the sale of an interest in land the vendor becomes a trustee for the purchaser of the interest contracted to be sold subject to a lien for the purchase-money; but however useful such a statement may be as illustrating a general principle of equity, it is only true if and so far as a Court of Equity would under all the circumstances of the case grant specific performance of the contract.

The interest conferred by the agreement in question was an interest commensurate with the relief which equity would give by way of specific performance, and if the plaintiff Miller had in his application attempted to define the nature of his interest he could only so define it. Further, if the registrar had, as in their Lordships' opinion he ought to have done, specified on the register the nature of the interest which he registered as a charge, he could only have so specified it. Had he attempted further to define the interest, had he, for example, stated it as an equitable fee subject to the payment of the purchase-money, he would have been usurping the function of the Court, and affecting to decide how far the contract ought to be specifically performed. As a matter of fact, the registrar did not, any more than the plaintiff Miller, attempt to define the interest in respect of which registration was granted. He granted registration, having (their

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Lordships will assume) first entered a copy of the agreement in the register of instruments under sec. 116, but the register merely shews that the plaintiff Miller is entitled to a charge under the agreement on the land in question, and leaves the nature of the charge to be inferred. At most, therefore, the plaintiff Miller became the registered owner of an interest commensurate with the interest which, under all the circumstances, equity would decree by way of specific performance of the agreement.

Now the interest of Wilmoth in this land being only such an interest as, under all the circumstances, equity would decree by way of specific performance of the agreement, the sheriff could no more than the registrar could in that case, define that interest, and if he could not define it then he could not sell it, and moreover if he attempted to define it for the purposes of sale he would be "usurping the function of the Court."

This fact is recognized by our rules of Court, which provide a means of defining such interests and having them sold. These rules are 338 to 341 inclusive. They provide for an originating summons to be taken out, and for an inquiry to be held to ascertain whether the property or the debtor's interest therein is liable for the satisfaction of the execution, and if liable, for the sale of the same, and pending the inquiry for the issue of an interim injunction to prevent the transfer or other disposition of the property.

In this case the judgment debtor was in default, and the trial Judge found that his interest was of no value, and it therefore was not a case in which specific performance would be ordered at his instance and therefore there was no interest which could be charged either under an execution against lands or under the provisions of the above-mentioned rules.

The only other question to be considered is the payment by the defendant to Wilmoth of $155. Under the finding of the trial Judge this is disposed of by the case of *Ridout* v. *Fowler*, [1904] 2 Ch. 93. There Vaughan Williams, L.J., said:—

> So far from proving that the £110 was paid as the price of an interest which Green had in the land, it is perfectly plain that the settlement took place on the basis that Green had no interest at all; that he was in default and had no right to the return of the deposit.

These are the facts in this case, and the conclusions must be the same.

The appeal should, therefore, be dismissed with costs.

*Appeal dismissed.*

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*Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Idington, Duff, Anglin and Brodeur, JJ.*

1. MUNICIPAL CORPORATIONS (§ II H—267)—TAXES—AGREEMENT TO ACCEPT A FIXED SUM—RATES SUBSEQUENTLY INCREASED—POWER TO REFRAIN FROM COLLECTING.

A municipal council having agreed to accept a certain fixed sum for water rates, and a subsequent by-law having been passed materially increasing the rates imposed and prohibiting the granting of any bonus unless the consent of the ratepayers is obtained (the supplying of water at rates less than those charged to other persons in the municipality being included in the word bonus) it is not illegal where no statutory prohibition exists for the municipality to recognize its moral obligation and adhere to an understanding for a commutation of rates and refrain from collecting the taxes levied over and above the amount agreed on.

2. PARTIES (§ I A 4—46)—MUNICIPALITY—TAXES ALLOWED TO REMAIN UNPAID—RIGHT OF RATEPAYER TO COMPEL COLLECTION.

Where a municipality has allowed a certain portion of the taxes levied against a property to remain unpaid for a number of years, a ratepayer has no status to maintain an action against the municipality to compel it to collect such arrears.

[*Norfolk* v. *Roberts*, 13 D.L.R. 463, affirmed.]

Statement

APPEAL from a decision of an Appellate Division of the Supreme Court of Ontario (13 D.L.R. 463), reversing the judgment for the plaintiff at the trial and dismissing his action.

The action was brought by the appellant on behalf of all ratepayers of the town of Brampton to compel the municipality to collect arrears of taxes from the Dale estate, florists in said town. The facts are stated by Mr. Justice Latchford in giving judgment at the trial as follows:—

The plaintiff adopted the suggestion of the Divisional Court, on appeal from the judgment of Sutherland, J., and elected to add, and did add, the municipal corporation of the town of Brampton as defendants. The case, thereupon came before me for trial upon the issue whether the municipality rightly or wrongly abstained from collecting certain arrears of water rates which the plaintiff contends it was their duty to have collected from the defendants, the executors of the Dale estate, during the period between 1903 and 1910, when the water system of the town passed into the control of commissioners elected under the Municipal Water Works Act.

On May 30, 1901, the executor of the Dale estate, as a result of a conference with a committee of the municipal council, made

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a proposition in writing offering $50 per year for water service instead of the $32 then paid, if the town corporation would at their own expense place a four-inch main and hydrant in Vodden street, and would agree that the rate of $50 would not be exceeded in the future, even should the premises be extended.

An alternative proposition was also submitted, as follows:—

"On the understanding that the present rate of $32 be increased to $40 per year, and will not be increased now nor in the future, we will do the excavating and filling in and furnish the necessary four-inch iron pipe; you to make the connection, lay the pipe, furnish the hydrant and all else necessary excepting the pipe."

The Water, Fire and Light Committee of the corporation considered the letter, and on June 3, reported to the council in favour of the adoption of the second proposition, excepting the clause "nor in the future"; and on the same day the council adopted the report as amended.

The municipality thus agreed that in consideration of the carrying out by the estate of the proposed work, the rates be not now increased above $40 a year.

It is not suggested that this was not a proper contract on the part of the town under the law as it stood at the time.

The Dale estate expended nearly $1,000 in putting in the main on Vodden Street and other mains, some or all of which were afterwards tapped by the corporation to supply water to householders. The estate also paid the $40 a year to the town.

By-law No. 272 came into effect on September 30, 1903, and imposed a heavy burden upon green houses. The fame which Mr. Dale had won for the roses and other commercial flowers produced at Brampton continued to increase after his death under the capable management of the business by his executor, Mr. T. W. Duggan, and it became necessary greatly to extend the area under glass. When Mr. Duggan learned that the town had in contemplation the imposition of the rates subsequently fixed by By-law No. 272, $11.12 for the first thousand feet of glass and $1.25 for each additional thousand feet—he wrote reviewing the arrangement of 1901, pointing out the importance, growth and advantages of the industry, and asking for a fixed rate. He sug-

gested at the same time that if any legal difficulties prevented such an arrangement the matter should be submitted to the ratepayers.

A legal difficulty had arisen owing to the definition of the word "bonus" by the Consolidated Municipal Act of 1903, which came into force on June 27. The supplying of water at rates less than those charged to other persons in the municipality was declared to be included in the word "bonus," sec. 591(*a*), sub-sec. (*e*); and the granting of a bonus was prohibited unless the assent of the electors should be obtained. Sec. 591, sub-sec. (12*a*).

There were other greenhouses in Brampton besides those of the Dale estate; and all became subject to the rate imposed by the by-law of September 30. By a resolution of the municipal council passed on December 21, 1903, the collector of water rates was instructed "not to collect from the Dale estate in excess of $50 for the past quarter (except such sums as may be charged for private dwellings) and that the balance of the charge for the current quarter, and future charges, be deferred so as to conform to the by-law passed by this council."

The charge on the greenhouses of the Dale estate, at the rates imposed by the by-law for the quarter referred to, was $111.22, based on an area of 348,000 feet.

How the matter stood in the following year is well stated in a letter which Mr. Duggan addressed to the council on November 7, 1904.

"You will remember," he says, "that the matter of our water rate was up last year. Up to that time we had been paying $40 per annum in terms of a verbal agreement made with the council when our large extensions were being entered into. After the new by-law of last year our premises were rated at a very much higher figure. The matter was subsequently inquired into by the council, and a recommendation was made by the committee of an increase from $40 to $200 per annum, net, in addition to the rating for the house. I consented to this compromise; but owing to some technicalities which were in the way, the council were unable to make the arrangement for more than the balance of the year ending December, 1903. It was intended, however, that no more than that rate should be charged us, but

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I do not think that the necessary means have been taken to put it in proper shape. Up to the last quarter of this year we were asked to pay only the $50 per quarter, as arranged for; but for the last quarter we have had a much larger bill rendered us, with an item for alleged arrears, which, of course, practically do not exist, but we presume that they appear because of the matter not having been properly disposed of."

The letter closed with a request for an interview. Nothing definite appears to have resulted from the interview, if indeed it was had. But it is clear that no effort was for some years made to collect more than the $50 a quarter, or to dispose of the arrears that had been accumulating upon the collector's roll.

On April 3, 1906, the council adopted a report of the Water, Fire and Light Committee instructing the collector "not to collect any arrears over $50 per quarter from the Dale estate for water used in their greenhouses"; and instructing the clerk "not to place any amount on the rate book in excess of $50 per quarter."

Between 1903 and 1906 additional greenhouses had been erected, but no change in the area of glass was recorded in the collector's books.

At a meeting of the council held on April 2, 1906, a report of the Water, Fire and Light Committee was adopted, recommending that the collector be instructed not to collect any arrears over $50 a quarter from the Dale estate for water used in the greenhouses, and that the clerk be instructed not to place any amount on the rate book in excess of $50 a quarter. Thereafter, up to the end of 1909, a charge of but $50 per quarter was entered and collected. The area of the glass assessable was continued upon the roll at 348,000 feet, though in fact new greenhouses had been added every year.

On these facts His Lordship held that the municipality was entitled to collect from the Dale estate all the taxes assessable in the past exceeding the amounts paid each year and ordered judgment to be entered accordingly. His judgment was reversed by the Appellate Division and the appellant's action dismissed.

*Thomson, Tilley & Johnston*, for appellant.

*Armour* K.C., for respondents.

SIR CHARLES FITZPATRICK, C.J.:—I agree with Mr. Justice Idington.

IDINGTON, J.:—The appellant suing on behalf of himself and all other ratepayers of the town of Brampton obtained as result of the trial a declaratory judgment that two of the respondents, executors of the Dale estate, were and are indebted to the corporation of the town of Brampton, another respondent, in the sum of $1,591.72 for water rates which the town corporation was entitled to collect but wrongfully abstained from collecting. This judgment has been reversed by the Court of Appeal and hence this appeal.

The executors of the Dale estate had applied in 1901 to the council of said town, possessed of a waterworks system, to extend its mains so as to give the property of the estate a more efficient service. The council could not see its way to so extending its mains at the expense of the municipality and accepted the following alternative proposition:—

> On the understanding that the present rate of $32 be increased to $40 per year, and will not be increased now nor in the future, we will do the excavating and filling in and furnish the necessary four-inch iron pipe; you to make the connection, lay the pipe, furnish the hydrant and all else necessary excepting the pipe.

after striking out the words "nor in the future" therein.

The executors of the estate acting upon the faith of this, expended at least a thousand dollars in extension of said mains upon the street of the town referred to in the proposition, and the town council, I infer, collected the rate so fixed therein, for a year or more.

But in September, 1903, a by-law was passed by the council fixing a general rate which if considered operative as against the Dale estate would have wrought a gross injustice.

The legislation of that year had prohibited exemption or commutation of water rates by way of bonus. And the parties concerned seemed to imagine there was no other way out of the difficulty than to agree to collect a rate of $50 a quarter and leave the balance uncollected.

Why this sort of method was resorted to would puzzle any one inexperienced in the ways of municipal management. On

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the whole it is well done, but on too many occasions lapses not unlike this will happen.

The main on Vodden St. on which the estate had expended the $1,000, had no doubt become the property of the town and there was nothing in the amendment to the law restricting bonus concessions, which prevented the council from doing justice by compensating the estate for this expenditure by way of an allowance in its rates.

Of course it could not have gone beyond that discharge of what was a plain obvious duty of common honesty in the premises; and under pretext thereof fix a permanent rate.

The striking out of the words "nor in the future" in the original proposition raised no barrier to this being done, but only left the matter in a loose, unbusiness like condition to be dealt with by future councils of the town.

The situation thus created has continued for years, but nothing so far as I can see has intervened to prevent the council from doing in substance that which that body could have done and, if I may be permitted to say so, ought to have done in the first place. I cannot think that the law ever contemplated that the council of a municipality is bound to take a dishonest advantage of any one in its dealings. And such certainly would be the effect of its enforcing the judgment pronounced at the trial.

The rates uncollected would not, so far as I can see, if interest is to be allowed on the original expenditure by the estate, exceed the money so expended. At all events a compromise of that kind is clearly within the honest judgment that the council might properly exercise without exceeding its powers.

If the matter had been in substance a resort to a dishonest subterfuge to defeat the provisions of the law relative to giving of a bonus, then I assume the Courts would be bound in a properly constituted suit to enforce the law.

This case does not give occasion for a consideration of the delimitation of the powers of the Court in this regard at the suit of a ratepayer. However, I am disposed to think that if the ratepayers were more alert in asserting their undoubted rights and invoking the aid of the Court to keep councils within the path of law and duty, we would perhaps have better municipal government.

It seems to me that the proceedings of the successive councils of Brampton acting in this matter have conducted their business in such an irregular manner as to invite litigation, and if it were not that the settled jurisprudence of this Court forbids interference in mere matters of costs, I should have felt disposed to modify in that regard the judgment appealed from. The appeal must be dismissed with costs.

Idington, J.

DUFF, J.:—I concur in the view of the Court of Appeal that the appellant had no status to maintain the action. I think the appeal should be dismissed with costs.

Duff, J.

ANGLIN, J.:—If the plaintiff had succeeded in establishing that what the municipal council did was within the "bonus" prohibitions of the Municipal Act and therefore an illegal disposition or abandonment of the property of the municipality, as a ratepayer he might have successfully maintained his action. But it is reasonably clear that nothing of that kind has been attempted. The council of the defendant corporation merely recognized a moral, if not a legal, obligation incurred towards its co-defendants by its predecessors, and, in consideration of those co-defendants having given to the municipality what it deemed substantially of equivalent value, determined, acting within its discretion, to adhere to an understanding with them for a commutation of water rates somewhat indefinite, but deemed by it sufficient to impose an obligation. Over the exercise of such discretion by a municipal corporation the Courts do not assert control or right of supervision.

Anglin, J.

Neither in the general Municipal Act (Ont.), nor in the special Act (41 Viet. ch. 26), do I find anything which renders the action of the municipal corporation illegal or *ultra vires*.

The Statute of Limitations probably also affords a defence to so much of the plaintiff's claim as represents arrears due more than six years prior to the addition of the municipal corporation as a party after the judgment of the Divisional Court rendered in November, 1911.

As to the alleged arrears of $190.20 for the year 1909, it would appear from the account rendered by the municipal corporation to the Dale estate (ex. 15), that on October 30, 1909,

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$53.34 was accepted as payment in full of water rates for that year presumably in pursuance of the understanding above referred to, and that there were no such arrears.

I would dismiss the appeal with costs.

BRODEUR, J.:—It is one of those actions which could be instituted by the corporation and the corporation alone, and if it is found that the council does not properly exercise its functions and fulfil its duties, it is for the ratepayers to make a change and put in persons who will fulfil their duties according to what the majority of the ratepayers think best.

The judgment of the Court below should be confirmed with costs.

*Appeal dismissed with costs.*

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## MERCHANTS BANK v. HAY.

*Manitoba King's Bench, Mathers, C.J.K.B. March 18, 1915.*

1. JUDGMENT (§ I E 3—35)—RENDITION IN CONFORMITY TO PLEADING—ACTION ON GUARANTY—LIQUIDATED DEMAND.

Manitoba K.B. Rule 625 is not confined to causes of action formerly covered by the common counts but extends also to a liquidated demand, and leave to sign final judgment thereunder may be granted in respect of an action upon a guarantee of a debt which was a liquidated demand if sufficient particulars of the plaintiff's claim upon the guarantee are disclosed and the defendant guarantor files no affidavit negativing liability or stating that he does not know that the debt is due.

[*Lloyd's Banking Co. v. Ogle*, 1 Ex. D. 262, distinguished.]

Statement

APPEAL from an order of the Referee.

*C. P. Fullerton*, K.C., for appellant.

*W. H. Curle*, for respondent.

Mathers, C.J.

MATHERS, C.J.K.B.:—This is an appeal from an order of the Referee refusing the plaintiffs leave to sign final judgment under Rule 625.

The plaintiffs' action is based upon a joint and several guarantee in writing by the defendant and one Frame of the indebtedness of the Frame & Hay Fence Co., Ltd., to the plaintiffs, incurred and to be incurred.

The learned Referee took the view that the application could not succeed because the claim of the plaintiffs was such as could

not formerly have been sued under the common counts. He was undoubtedly right in holding that a plaintiff, suing upon a guarantee, could not, before the Judicature Act, have recovered under these counts: *Mines* v. *Sculthorpe* (1809), 2 Camp. 215; De Colyar on Guarantees, 226; but I cannot agree that that point is decisive of the application.

Rule 625 permits a motion for judgment to be made after a statement of defence has been filed in an action in which the plaintiff's claim is such a demand as comes within the classes of cases mentioned in para. (*d*) of Rule 300, that is to say,

> where the whole or part of the cause of action is a debt or liquidated demand, *or*, such a demand as would have been the subject of an action upon the common or money counts or one or more of such causes of action.

Rule 625 is not therefore confined to causes of action formerly covered by the common counts, but extends also to any "liquidated demand." If the indebtedness of the company to the plaintiffs is liquidated it follows, as it seems to me, that an action upon a guarante of that debt is upon a liquidated demand, and therefore within the rule.

It was not contended that the debt from the company to the bank was not a liquidated demand or that the statement of claim does no give sufficient particulars of the plaintiffs' claim to disclose its nature, and I therefore assume that defendant's counsel was satisfied upon that point.

The case of *Lloyd's Banking Co.* v. *Ogle*, 1 Ex. D. 262, was relied upon by the defendant. In that case Baron Bramwell, after consulting four Judges of the Common Pleas Division, laid it down as a general rule, applicable to actions upon a guarantee, that where there is no acknowledgment of the debt by the defendant or anything else to shew that the defence is for mere purposes of delay, the defendant should not be prevented from going to trial.

In that case the defendant had made an affidavit that he was unable to ascertain whether anything was due on the guarantee and believed that nothing was due and that he was one of several guarantors. The facts sworn to evidently influenced the judgment, because the learned Baron says:—

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Where a guarantor *bonâ fide* says that he does not know that the debt is due and that he requires it to be proved, I think the statute was not intended to operate to take that right from him.

In this case the defendant has made no affidavit. If he could have made such an affidavit as was made in the *Lloyd* case he no doubt would have done so.

The plaintiffs have complied with the requirements of r. 625, and in my opinion are entitled to judgment. An order will go reversing the order of the Referee and empowering them to sign judgment for the amount of their claim and costs of suit, and of this appeal, and of the motion before the Referee.

*Judgment for plaintiff.*

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## SAGER v. MANITOBA WINDMILL & PUMP CO.

*Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Davies, Idington, Duff, and Brodeur, JJ.*

1. FRAUD AND DECEIT (§ I—1)—MATERIAL AND FALSE REPRESENTATION—DELAY IN DISCOVERING THE FALSITY.

Where a party to a contract induces the other party to enter into it by a material and false representation, the effect of such false representation cannot be got rid of on the ground that the person to whom it was made might have discovered the truth if he had used diligence, unless there is such delay as constitutes a defence under statutory limitations.

[*Sager* v. *Manitoba Windmill Co.*, 13 D.L.R. 203, 16 D.L.R. 577, affirmed; *Clough* v. *L. & N.W.R. Co.*, L.R. 7 Ex. 26, 41 L.J. Ex. 17, applied.]

2. CONTRACTS (§ V C 2—397)—RESCISSION — RESTORING BENEFITS—PURCHASE.

The general rule that in order to entitle a purchaser of property to rescind a voidable contract against the vendor, such purchaser must be in a position to offer back intact the subject-matter of the contract does not apply where such subject-matter has become deteriorated solely by the fault of the vendor himself.

[*Sager* v. *Manitoba Windmill Co.*, 13 D.L.R. 203, 16 D.L.R. 577, affirmed; *Clough* v. *L. & N.W.R. Co.*, L.R. 7 Ex. 26, 41 L.J. Ex. 17, applied.]

Statement

APPEAL from the judgment of the Saskatchewan Supreme Court, 16 D.L.R. 577, affirming a judgment of Johnstone, J., 13 D.L.R. 203.

*G. E. Taylor*, K.C., for plaintiff, respondent.

*J. W. Bain*, K.C., for defendants, appellants.

Sir Charles Fitzpatrick, C.J.

SIR CHARLES FITZPATRICK, C.J.:—I concur, with some hesitation, in the judgment dismissing this appeal. A careful examin-

ation of all the evidence has left with me the very firm conviction that the respondent, who was himself at one time an agent for the sale of agricultural instruments in the U. S. was, when he gave the order, sufficiently informed of the nature of the agreement which he had signed and subject to which he subsequently accepted delivery of the engine. The conditions of the contract are, it is quite true, exceedingly onerous and, as found by the learned trial Judge, difficult for a layman to appreciate. But bearing in mind the past experience of Sager with this particular kind of business, the fact that he consulted a lawyer on whose advice he launched his action originally, I have some difficulty in finding that he is entitled to the relief given him in the Courts below, based as it must be upon the assumption, that before receiving and accepting the engine he was ignorant of the terms of his agreement.

I will be content to add that the conduct of the company and its agents is so absolutely indefensible that I am relieved by the thought that probably substantial justice is done by dismissing this appeal.

Davies, J.

DAVIES, J.:—The judgment of the Supreme Court of Saskatchewan was delivered by Mr. Justice Elwood, and I think he states both the facts and the law satisfactorily.

Mr. Bain took two exceptions to this judgment. In the first place, he says the plaintiff was too late in electing to rescind; and, secondly, that if he was not too late there must be a reference to recover damages for deterioration of the machine sold to plaintiff.

With respect to the rescission of the contract by the plaintiff, I think his letters and conduct are sufficient evidence of rescission by him.

The first letter is dated May 31, 1910, a few days after the appellants' expert had tried and failed to make the engine work properly. The plaintiff respondent states the facts of the failure and asks for a return of the notes he had given and the $1,000 he had paid and the freight he had paid.

He was induced to allow appellants' agents to make further attempts to get the engine to work properly, but these also hav-

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ing failed, he writes the letter of July 31, 1910, in which, after stating in his own homely way, the unsatisfactory character and working of the engine, he winds up by saying that he did not "think he wanted to bother with it any longer," and asks whether he will "return it to Bells Plains where it had been delivered to him."

To this letter he never received any answer, and though subsequently other experts were sent by defendant appellants with plaintiff's acquiescence to try and make the machine work, they failed. I do not see that these experiments can be used in any way as evidence of delay on plaintiff's part, or of any change in his determination to rescind the contract.

It is true that the statement of claim first filed by plaintiff did not formerly claim that he had elected to rescind, but I do not think the necessary amendment was made too late.

As to the claim for a reference to ascertain the damage to the engine from deterioration from exposure, my conclusion is that the only fair inference to draw from the evidence is that the engine when left by the last expert of the defendant, who experimented with it, was left in a disabled condition and must be held to have been so left at defendants' risk. If they chose, after receiving the letters the plaintiff had written them, and under all the circumstances as proved, to leave the machine in a field in practically an unworkable condition, and it deteriorated in value in consequence of such exposure, it was their own fault. No complaint is, or can be made as to the amount of damages awarded by the jury.

The appeal should be dismissed with costs.

Idington, J.

IDINGTON, J.:—The jury having found that the contract in question was induced by the fraud of appellant through its agent, seems to reduce the questions necessarily involved in this appeal to the one turning upon the right of respondent to repudiate it.

He did in fact repudiate the contract by his letter of July 31, 1910, and instruct a solicitor to sue for rescission of the contract and delivery up of his notes and return of the money

paid and such a suit was brought, but founded upon reasons that might not, in face of the very peculiar form of contract signed, have led to rescission.

If the contract had in fact contained all that respondent was by the fraud practised induced to believe it contained, I am not prepared to say he would have failed in his suit for rescission as originally launched. He might have, in following up that remedy in answer to the pleading setting up the special mode of rescission, which the contract as signed contained, have answered by a reply setting up the fraud discovered pending the litigation in answer to such defence. The decision in *Clough* v. *The L. & N.W. Ry. Co.*, L.R. 7 Ex. 26, 41 L.J. Ex. 17, would have maintained such a reply. That, however, was not the course the litigation pursued.

The pleadings were amended by directly charging the fraud and asking on that, as well as other grounds, the rescission of the contract, and upon such issue the finding of the jury seems fatal to the appellant's contention. The contract in truth never was affirmed after the repudiation of July 31, and a later letter.

The machine in question never was used by the respondent after the first of said letters, though used by appellant's agent on the respondent's place, in an effort to induce him to accept it, and no reason given appellant to suppose he had receded from his declared intention to rescind.

The allegation of one of the causes of action, which in effect could only be maintained by affirming the contract is only an illustration of the inconsistent contentions which Mr. Justice Mellor refers to in the judgment of the Court of Exchequer Chamber in the case of *Clough* v. *L. & N.W. Ry. Co.*, *supra*.

I think it must be so treated here as the like question was there. It seems to me that (in that regard, and all others bearing upon this question in issue), in legal principle this question raised herein falls within what was acted upon in that case and must be decided accordingly. The very fraud found furnishes the answer to the question of its non-discovery earlier.

The claim for allowances caused by deterioration on the machine cannot be considered in view of the facts that when

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it was tendered back and appellant asked if it desired it to be returned to the station whence it was taken, it was then in as good condition as ever and the appellant chose, by its silence, to refuse to accept and suffered in consequence that deterioration complained of.

The merits of the case seem to be in regard to the machine and the delays and failures in rendering it workable up to the standard promised, entirely with the respondent.

The appeal should be dismissed with costs.

Duff, J.

DUFF, J.:—The two points raised on behalf of the appellants reduce themselves to questions of fact; the first question being whether the jury, having found that the respondent's signature to the document, relied upon by the appellants, was procured by fraudulent misrepresentations as to the contents of it, the respondent, nevertheless, by his conduct had precluded himself from disputing that the document as it stands truly expresses the terms of the contract between himself and the appellants. The jury found that the respondent first became aware, when the document was read over to him by Mr. Taylor, after the change of solicitors, of the fraud that had been practised upon him, and I agree with the Judges of the Court below in thinking that there is nothing in the respondent's conduct from that time on prejudicially affecting his right to impeach the instrument.

The second question is whether, in the circumstances, there is any ground for a reference to ascertain what the appellants are entitled to, if anything, by way of compensation for deterioration. I think such a reference would be useless, as the evidence sufficiently shews that if there was any deterioration it is really attributable to the misconduct of the appellants.

Brodeur, J.

BRODEUR, J., concurred with DUFF, J.

*Appeal dismissed with costs.*

## McPHEE v. ESQUIMALT AND NANAIMO R. CO.

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*British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher, and McPhillips, JJ.A. August 10, 1915.*

1. Evidence (§ I B—15)—Judicial notice—Proclaimed railway orders.

The publication of the orders and general train and interlocking rules under sec. 31 of the Railway Act (Can.) gives them the effect of statutes, of which the courts are bound to take judicial notice; but the omission to publish them does not necessarily invalidate them, it merely necessitates their proof before the courts can act on them.

[*Underhill* v. *C.N.R.* (1915), 22 D.L.R. 279, followed; *Clark* v. *C.P.R.* (1911), 2 D.L.R. 331, 17 B.C.R. 314, distinguished.]

2. Trial (§ II C 8—148)—Volens—Contributory negligence—Questions for jury.

The question as to whether an engineer employed by a railway company received his injuries through his own negligence or whether he voluntarily assumed the risk is one of fact for the jury.

[*McPhee* v. *Esquimalt, etc., R. Co.*, 16 D.L.R. 756, 49 Can. S.C.R. 43; *Canada Foundry Co.* v. *Mitchell* (1904), 35 Can. S.C.R. 452, followed.]

3. Trial (§ II D 1—170)—Taking case from jury—Volens.

In the case of *volens* a very slight amount of evidence will prevent the court from withdrawing the question from the jury.

[*Creveling* v. *Can. Bridge Co.*, 21 D.L.R. 662; *McPhee* v. *Esquimalt, etc., R. Co.*, 16 D.L.R. 756, 49 Can. S.C.R. 43, 48, referred to.]

4. Appeal (§ VII L 2—476)—Review of facts — Findings of jury — Volens.

Where the issue of *volens* has been fought out at the trial and clearly presented to the jury in the form of a specific question which they have not answered, the appellate court has no power to substitute itself for the jury to make such finding.

Statement

Appeal from judgment for plaintiff in action for personal injury.

*Sir C. H. Tupper*, K.C., for appellant.

*S. S. Taylor*, K.C., for respondent.

Macdonald, C.J.A.

Macdonald, C.J.A.:—I would dismiss the appeal.

Irving, J.A.

Irving, J.A.:—After the first trial of this action, where the jury omitted to return an answer to a question on the defence of *volens*, this Court (18 B.C.R. 450) under O. 58, r. 4, directed judgment to be entered for the defendant on that defence, but the Supreme Court of Canada (16 D.L.R. 756) with some doubting, I observe, on the part of two members of that Court, overruled our unanimous decision and directed that a new trial should be held.

The action having come on for trial, certain questions very nearly the same as those submitted at the first trial were sub-

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mitted, and answered, and a motion made by plaintiff's counsel for judgment. After the defendants' counsel had suggested in the argument on this motion the insufficiency of one of the answers, the learned trial Judge decided to send the jury back (reserving to the defendants any rights they might have) to reconsider the answer.

I would overrule the application for a new trial as I do not think there is any substance in this point so far as it is concerned. Nor can I accede to the other points raised, *viz.*: that the damages were excessive: see *Houghton* v. *C.N.R. Co.* (1915), 21 D.L.R. 295. The real question is, was the verdict that the plaintiff was not guilty of negligence against the weight of evidence? But there are two minor points to be first dealt with.

As to the construction to be put on sec. 31 of the Railway Act, I agree with the opinion of the Manitoba Court of Appeal in *Underhill* v. *C.N.R. Co.* (1915), 22 D.L.R. 279. There is nothing in *Clark* v. *C.P.R.* (1911), 2 D.L.R. 331, 17 B.C.R. 314, binding on this Court to the contrary, and the question was not argued there. Publication of the order gives it the effect of a statute, and Courts would then be bound to take judicial notice of it. The omission to publish it cannot invalidate it. The omission merely necessitates the proper proof of the order before the Court can act on it. The general train and interlocking rules were therefore properly admitted in evidence as being in force although not published in the *Gazette*.

The pleadings shew that the E. & N. (now the only defendant by consent) admitted that the plaintiff was an engineer on their shovel, but denied that the plaintiff was "lawfully engaged in the performance of his duties as such engineer in the employ when he sustained the injuries." Par. 11 of the statement of defence is as follows:—

> This defendant says that if the plaintiff was injured while in the employ of this defendant at the time and in the manner mentioned in the statement of claim, such injuries were due to the plaintiff's own negligence.

The second paragraph of the reply was as follows:—

> The plaintiff denies that the injuries sustained by the plaintiff were caused by the plaintiff's own negligence and the plaintiff further denies that the plaintiff was negligent in any way whatsoever.

Particulars of par. 11 were demanded by the plaintiff, but when furnished, did not include the case of running on the main line, which expression is intended to convey the defence that the plaintiff was forbidden by the rules to travel on the main line under his own steam, the engine not being intended for that class of work. Having regard to the particulars, I do not think that point is open to defendants—the only matters are (1) was the plaintiff negligent in not exercising due care when working about a dangerous machine; (2) was he negligent in working about the steam shovel when in motion. On these points I cannot say that the finding is against the weight of evidence. I would therefore dismiss the appeal.

Martin, J.A.

Martin, J.A.:—First, as to the point that was raised about the additional answer the jury gave to the 3rd question, I think it is immaterial how the jury's action is viewed because the additional answer does not advance the matter and is in essence the same as the first, viz.: that the proximate cause was the "exposed gear" which is equivalent in the circumstances to "unguarded cog wheels."

As to *volens* I understand the judgment of the Supreme Court herein to mean that where the issue of *volens* has been fought out at the trial and clearly presented to the jury in the form of a specific question which they have not answered, then there has been no finding upon that question and this Court has not the power to substitute itself for the jury and make such a finding.

That is far from saying that the Court has not the power in the case of *volens*, as well as in that of negligence or contributory negligence, to decide the question that in a given case "the acts from which it is argued consent ought to be inferred are reasonably capable of any other interpretation," or what is "the only reasonably possible inference from a given state of facts"—pp. 57 and 53-4-5. And see also the later remarks of Mr. Justice Duff in *Crevcling* v. *Can. Bridge Co.* (1915), 21 D.L.R. 662, at 670, 671, where the matter is dealt with on this assumption. At the same time it would appear, if the view of Mr. Justice Idington in this case is to be accepted, that

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in the case of *volens* a very slight amount of evidence would prevent the Court from withdrawing the question from the jury, because he says, 16 D.L.R. 759:—

> I therefore conclude that it must be taken that the question is one for the jury in almost any conceivable case, save the one of an express contract, and one that must be submitted to the jury.

In the case at bar the jury has negatived *volens*, but it is submitted that there is no evidence to support that finding. I am, however, unable to take that view and think the question was properly left to the jury and also that of contributory negligence.

Objection was taken to certain portions of the charge on the question of *volens*, but we must read it as a whole—*Jones* v. *C.P.R. Co.* (1913), 13 D.L.R. 900—and after so doing I think the objection should not prevail.

A good deal was said about the alleged infraction of the rules by McPhee in taking the shovel on to the main line. I have grave doubt whether that issue was ever properly raised, especially seeing that it could only have come up, if at all, on the pleadings under the heading of contributory negligence, and it was objected to as being excluded by the particulars, and the defendant counsel formally disclaimed setting it up under that issue. The learned Judge shared this doubt as expressed in his charge, but held that in any event it was open to the jury to exonerate the plaintiff because of the orders he had received from the roadmaster, Newman.

The appeal I think should be dismissed.

Galliher, J.A. (dissenting)

GALLIHER, J.A., dissented.

McPhillips, J.A.

MCPHILLIPS, J.A.:—This appeal is one which may be said to be on the border line and is one of exceeding great nicety. Were it not for the judgments of the Supreme Court of Canada in *The Canada Foundry Co.* v. *Mitchell* (1904), 35 Can. S.C.R. 452, and the judgment of the same Court on the appeal in this action following the first trial (16 D.L.R. 756, 49 Can. S.C.R. 43), reversing the judgment of this Court which had held (18 B.C.R. 450) that the maxim *volenti non fit injuria* applied—I would have been disposed—notwithstanding the verdict of the

jury on the second trial negativing *volens*—to come to the conclusion that the plaintiff is not entitled to recover—in that upon the facts of the present case the plaintiff who was not in a subordinate position—but in a position of control and who could have easily procured the necessary guard for the gear—apparently chose to pursue a dangerous course, and that he was really the author of his own injury. And I might further say that I am rather of the opinion that it was a duty incumbent upon the plaintiff to have seen to it that the proper guard was provided for the gear. That being the position of matters it might be deemed unreasonable for the jury to negative the plea of the defendants of *volenti non fit injuria*. However, in view of the judgment of the Supreme Court of Canada which I trust I rightly apprehend (16 D.L.R. 756, 49 Can. S.C.R. 43) the question of *volens* is peculiarly one for the jury—when as in the language of Mr. Justice Duff at p. 762, there is "no evidence of express consent or agreement on the part of the plaintiff." It may be further said that the Supreme Court of Canada plainly indicates that in the absence of express consent or agreement—to take the risk without precautions—it is for the jury to say—in the language of Mr. Justice Duff (16 D.L.R. 756, 49 Can. S.C.R. 43) at p. 762, "whether in all the circumstances the conduct of the plaintiff amounted to such consent."

In view of this very explanatory judgment of the Supreme Court of Canada I cannot refrain from remarking that the questions as put upon the second trial admitted of much improvement, to really and effectually discern the true intent and meaning of the jury. As it is, although this Court has plenary powers and may enter judgment for either party, with or without a finding of the jury, and against the finding of the jury, yet it is a power not to be lightly exercised. Now, although the power resides in this Court to enter judgment for the defendants upon the plea of *volenti non fit injuria*, notwithstanding the answer of the jury, in what cases is this permissible? In this case on appeal to the Supreme Court of Canada (16 D.L.R. 756, 49 Can. S.C.R. 43) Mr. Justice Duff said at p. 762:—

By the law of British Columbia, the Court of Appeal in that province has jurisdiction to find upon a relevant question of fact (before it on

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appeal), in the absence of a finding by a jury or against such a finding where the evidence is of such a character *that only one view can reasonably be taken of the effect of that evidence.*

It would therefore appear to be necessary for this Court if disagreement with the answer of the jury is to be found, to be of the opinion that, only one view can reasonably be taken of the effect of the evidence having relation to the plaintiff's conduct in continuing in his employment without a proper guard being provided for the gear, and that is that he took upon himself that risk without precautions and that he was really the author of his own injury. It is with some considerable hesitation that I come to the conclusion that the present case is not one for the exercise of that power of overruling the answer of the jury, in that I cannot say unqualifiedly that "only one view can reasonably be taken of the effect of the evidence," upon the question of *volenti non fit injuria.* Lord Justice Romer in *Williams* v. *Birmingham Battery and Metal Co. Lim.*, [1899] 2 Q.B. 338, 68 L.J.Q.B. 918, said at pp. 920, 921:—

> Many authorities bearing on the question we have to decide have been cited and discussed. I do not purpose to review them. They appear to me to establish the following propositions as to liability at common law of an employer of labour. If the employment is of a dangerous nature, a duty lies on the employer to use all reasonable precautions for the protection of the servant. If, by reason of breach of that duty, a servant suffers injury, the employer is *primâ facie* liable. And it is no sufficient answer to the *primâ facie* liability of the employer to shew merely that the servant was aware of the risk and of the non-existence of the precautions which should have been taken by the employer, and which, if taken, would or might have prevented the injury. In order to escape liability the employer must establish that the servant has taken upon himself the risk without the precautions. Whether the servant has taken that upon himself is a question of fact to be decided on the circumstances of each case. In considering such a question the circumstance that the servant has entered into or continued his employment with knowledge of the risk and of the absence of precautions is important, but not necessarily conclusive against him.

It would seem to me that in view of these propositions of law approved by the Supreme Court of Canada, in this case upon appeal (16 D.L.R. 756, 49 Can. S.C.R. 43), and in view of the further propositions as laid down by the Supreme Court of Canada, that the only permissible conclusion is that the defendants have not established that the plaintiff took upon himself

the risk without the precautions, and being constrained so to hold, it follows that the defendants cannot escape upon their plea of *volenti non fit injuria*.

I would dismiss the appeal.

*Appeal dismissed.*

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## LYMAN'S Ltd. v. GAGNER.



*Alberta Supreme Court, Hyndman, J. June 25, 1915.*

1. LIMITATION OF ACTIONS (§ IV C—167)—INTERRUPTION OF STATUTE—PROMISE OR ACKNOWLEDGMENT—"MY DEBT."

Agreeing to waive the Statute of Limitations is not a sufficient acknowledgment unless coupled with a promise; and though the expression "my debt" might by itself be construed as implying a promise of immediate payment, it is not so if negatived by the debtor's statement of his inability to pay.

[*Rackham* v. *Marriott*, 2 H. & N. 196; *Smith* v. *Thorne*, 18 Q.B. 134, followed.]

ACTION on debt barred by limitations.

Statement

*Cormack & Mackie*, for plaintiff.

*Gariepy and Dunlop*, for defendant.

HYNDMAN, J.:—After a careful perusal of the authorities I have come to the conclusion that the plaintiff cannot succeed.

Hyndman, J.

The letter which plaintiff contends is an acknowledgment sufficient to take the case out of the Statute of Limitations is as follows:—

> I have no objection whatever to renounce prescription of "my debt" to Lyman Sons & Company. I am not afraid of proceedings as I have not a cent to my name, but I do not think I should refuse what these gentlemen ask.

This letter was in answer to one from the plaintiff's solicitor which reads as follows:—

> Dear Sir. Mr. Watt asked me to communicate with you to settle a claim of Lyman & Sons against you in order to avoid prescription. If you are willing to renounce prescription, I will prepare the necessary documents and forward them to you; on the other hand if you do not agree to this I shall be obliged, although to my great regret, to sue.

The plaintiff's solicitor was to prepare the necessary documents and forward them for signature to the defendant, but this was never done. Now in order that the acknowledgment be effec-

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tive it must be of such a nature as not to be inconsistent with an implied promise to pay the whole debt claimed. It must contain a promise to pay either express or implied.

In my opinion the most that can be inferred from the letter in question is a promise by the defendant to agree not to take advantage of the Statute of Limitations; but he says also he is not afraid of legal proceedings as he has not a cent to his name. The expression "my debt" might by itself be construed as implying a promise of immediate payment, but does not his statement that he has not got a cent to his name negative any such implied promise; he not only does not promise to pay the debt but practically says he cannot pay it, for the very good reason that he has not got the money—even if not going further and questioning the claim. Agreeing to waive the Statute of Limitations is not sufficient acknowledgment unless coupled with a promise.

In the case of *Rackham* v. *Marriott*, 2 H. & N. 196, Cockburn, C.J., says:—

> There is here an acknowledgment of a debt, but not an acknowledgment coupled with a promise to pay either on demand or at a future period which has elapsed or on a condition which has been fulfilled. An acknowledgment without a promise is not sufficient to take a case out of the Statute of Limitations. Looking into the Current of Authorities, and more especially to the case on the subject, *Smith* v. *Thorne*, 18 Q.B. 134, and being of opinion that the principle is applicable to the present case, we think that the acknowledgment must amount to a promise to pay either on request or at a future period, or on a condition. Here there is a mere expression of a hope to make some satisfactory arrangement not an acknowledgment coupled with a promise to pay.

I, therefore, must come to the conclusion that the plaintiff fails in the action as it appears to me that no promise to pay can possibly be inferred from the letter relied on by the plaintiff in the action. As I have little sympathy with persons who take advantage of the Statute of Limitations to avoid the payment of just debts there will be no costs allowed to the defendant.

*Action dismissed.*

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## Re JONES AND TOWNSHIP OF TUCKERSMITH.

*Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Garrow, Maclaren, and Hodgins, JJ.A. April 26, 1915.*

1. HIGHWAYS (§ V A 1—245)—DEDICATION BY PLAN—CLOSING—POWER OF MUNICIPALITY.

A street as it appears on a plan registered by the owner of a tract of land, but which was fenced in with the remaining land and never used as a street, is nevertheless a public highway within the meaning of sec. 44 of the Survey Act, R.S.O. 1914, ch. 166, and by virtue of secs. 601 and 673(1) of the Consolidated Municipal Act, 1903, the municipal council has power to pass a by-law closing it up.

2. EASEMENTS (§ IV—46)—HOW LOST—RIGHT OF WAY—NON-USER—CONVERSION TO PUBLIC HIGHWAY—CLOSING.

A mere non-user by the abutting owners of a right of way or street as it appears of a registered plan of survey does not of itself, where there is no intention to that effect, operate as an abandonment of such rights; but these private rights or easements abate when the street becomes a public highway and cannot be relied upon as a bar to the right of the municipality to close the street.

3. HIGHWAYS (§ V A 1—249)—CLOSING OF—OBJECTIONS TO—OPPORTUNITY OF HEARING.

Objections to the passage of a by-law once heard by the municipal council at a meeting when the by-law was first considered does not entitle the opponents thereto to an opportunity again to be heard in another session for the final passage of the by-law.

4. MUNICIPAL CORPORATIONS (§ II C 3—70)—LEGISLATIVE FUNCTION—CLOSING OF HIGHWAYS—POWERS OF MUNICIPAL COUNCIL.

In the case of the closing of a highway the question of what is or is not in the public interest is a matter to be determined by the judgment of the municipal council, and if within the limits of its powers, is not open to review by the court; and a by-law will not therefore be set aside on the ground that it was passed in the interest of a certain person where there is nothing to shew that the action of the council was in bad faith.

5. HIGHWAYS (§ V A 2—251)—CLOSING—RIGHTS OF ABUTTING OWNERS—MEANS OF ACCESS.

Sub-sec. 1 of sec. 629 of the Consolidated Municipal Act, 1903, prohibiting the closing of any highway whereby abutting owners are deprived of access to their lands applies only to cases when the only convenient means of access is over the land closed up, and not where there is already another means of access though less convenient; nor does it apply in favour of purchaser of a lot on the closed portion of the highway after the passage of the by-law or who had knowledge that it was about to be passed at the time of the purchase.

6. HIGHWAYS (§ V A 2—250)—SALE OF CLOSED HIGHWAY—RIGHTS OF ABUTTING OWNERS—AUTHORITY OF COUNCIL.

The effect of sub-sec. 11 of sec. 640 of the Consolidated Municipal Act, 1903, is that the municipal council has no authority to sell the *situs* of a closed highway without first offering it to the abutting owners, and it is only in the event of their refusal that authority is given to sell to any one else; and a by-law passed or conveyance made in contravention of that authority will be set aside.

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APPEAL from the judgment of Latchford, J.

*R. S. Robertson* and *R. S. Hays*, for the appellants.

*William Proudfoot*, K.C., for the plaintiffs, the respondents.

The judgment of the Court was delivered by

MEREDITH, C.J.O.:—This is an appeal by the defendants in the action, and the respondents to the motion, from the judgment dated the 30th December, 1914, which was directed to be entered by Latchford, J., after the trial of the action and the hearing of the motion before him on the 30th September, 1914.

The action was begun on the 8th September, 1913, and by it the respondents seek to have set aside a by-law passed on the 13th January, 1913, by the council of the appellant corporation, by which it was enacted:—

"(1) That all that portion of Mill street in the . . . village of Egmondville that lies north of the intersection of Queen street with said Mill street be and the same is hereby stopped up and closed.

"(2) That the reeve of this municipality be and he is hereby authorised and instructed, for and on behalf of this corporation, to execute and attach the corporate seal of this corporation to a deed of conveyance of the above-described portion of Mill street to the highest bidder therefor."

The motion was a motion to quash the by-law, and was launched after the action was begun. The by-law is attacked on the following grounds:—

(1) That it was not passed in the public interest, but to serve the private interest of the appellant Kruse, and in pursuance of a collusive arrangement between him and the appellant corporation that he should become the purchaser of the portion of the street which the by-law purports to close.

(2) That the opponents of the by-law were not afforded an opportunity of being heard, although they had applied to be heard in opposition to the by-law.

(3) That the effect of the by-law will be to deprive the respondents of access to their lots over Mill street, and that there was no jurisdiction to pass it without first providing them, and those whose lands adjoin Mill street, with compensation and some other convenient road or way of access to their lots.

And the conveyance to Kruse of the part of the street which is closed by the by-law is attacked on the ground that the sale to him was made without proper notice or publicity, and without giving the respondents "and others interested an opportunity, if they so desired, of bidding on the said land."

The motion came on to be heard before Middleton, J., and he gave judgment quashing the by-law. It appears from the reasons for judgment, *Re Jones and Township of Tuckersmith* (1914), 5 O.W.N. 759, that the ground of the decision was that, as Mill street had not been assumed by the appellant corporation for public use, its council had no jurisdiction "to close and sell it and keep the proceeds." The view of my brother Middleton was, that sec. 637 of the Consolidated Municipal Act, 1903, related only to original allowances for road and other public highways, streets, or lanes; that a road allowance shewn upon a plan, but not assumed by the corporation for public use, did not fall within that designation; and that, although for some purposes it was a highway, it remained, subject to the rights of the public, to be governed by the Surveys Act (1 Geo. V. ch. 42, sec. 44), and might be closed under the provisions of the Registry Act; but that, when it was closed and the public rights were extinguished, it belonged to the abutting owners and not to the corporation.

The order of my brother Middleton was set aside by a Divisional Court, but liberty was given to the respondents to renew the motion before the Judge at the trial of the action, who was not to be bound by the judgment of my learned brother; and it was directed that, if the trial of the action was not proceeded with at the next sittings at which it could be had, the motion to quash might be renewed before a single Judge on such additional material as the respondents might be advised to bring before the Court, and that if the motion was not proceeded with the appeal should be allowed: *Re Jones and Township of Tuckersmith*, 16 D.L.R. 869, 6 O.W.N. 379.

The action came on for trial and the motion to be heard before Latchford, J., on the 30th September, 1914, and it is from the judgment which he directed to be entered that the appeal is brought.

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My brother Latchford, differing from the conclusion reached by my brother Middleton, decided that, "although not opened up or accepted by the municipality," the part of Mill street which is in question became a public street, and he also held, following, as he said, *Roche* v. *Ryan*, 22 O.R. 107, that the freehold of it was vested in the appellant corporation. He also held that sec. 640, sub-sec. 11, of the Consolidated Municipal Act, under which, he said, it was argued that the respondents and other owners of lands on the west side of Mill street should have been given the option to purchase the street, and that only upon their refusal to purchase could the street be sold, did not "apply except in cases where a new road or street has been opened in lieu of the old;" citing in support of that conclusion *Cameron* v. *Wait*, 3 A.R. 176, 180.

Although he decided these questions in favour of the appellants, he came to the conclusion that the by-law must be quashed, because, as he held, "Mill street provided the only means of access to such lots as that owned, at the time the by-law was passed, by such persons as the" respondent "Jones," and because, as I understand his reasons for judgment, he was of opinion that the by-law was not passed in the public interest and perhaps also not in good faith.

The first question to be considered is, whether or not the part of Mill street which is in question was a common and public highway. It was laid out on a plan of a survey made for the owner of part of a farm lot in the township of Tuckersmith, and the plan was registered on the 13th August, 1873. On the plan are shewn 5 streets, one of which is Mill street, and 32 lots, 16 of which abut on Mill street. A survey had previously been made of a part of the farm lot lying southerly of the land included in this survey, belonging to another owner, and a plan of the earlier survey was registered on the 8th September, 1857, and upon it Mill street is laid down, and Mill street on the later plan is a continuation northerly of that street.

Prior to the 13th April, 1897, the provisions of what is now sec. 44 of the Surveys Act, R.S.O. 1914, ch. 166, did not apply to townships; but, by 60 Viet. ch. 27, sec. 20, they were made to extend to townships; and, by sec. 44 of 1 Geo. V. ch. 42, which

was the Act in force when the by-law in question was passed, it is provided that, "subject to the provisions of the Registry Act, as to the amendment or alteration of plans, all allowances for roads, streets or commons surveyed in a city, town, village or township, or any part thereof, which have been or may be surveyed and laid out by companies or individuals and laid down on the plans thereof, and upon which lots fronting on or adjoining such allowances for roads, streets, or commons have been or may be hereafter sold to purchasers, shall be public highways, streets and commons" (sub-sec. 1).

This provision was first enacted by 12 Viet. ch. 35, sec. 41, and was then applicable only to towns and villages, but was extended to cities by 50 Viet. ch. 25, sec. 62, and afterwards to townships by the enactment to which I have referred.

By the Municipal Act of 1858 (22 Viet. ch. 99), sec. 323, from the roads, streets, bridges and highways which the corporation is required to keep in repair, are excepted "any road, street, bridge or highway laid out without the consent of the corporation by by-law until established and assumed by by-law;" and this provision, somewhat altered in form, has continued to form part of the Municipal Act down to the present time. In the Consolidated Municipal Act of 1903 it is found in sec. 607, which reads as follows: "The last preceding section" (i.e., the section imposing the obligation to repair) "shall not apply to any road, street, bridge or highway laid out by any private person, and the corporation shall not be liable to keep in repair any such last mentioned road, street, bridge or highway, until established by by-law of the corporation, or otherwise assumed for public user by such corporation;" and the corresponding section in R.S.O. 1914, ch. 192, is sec. 460 (6).

This provision was also introduced as a proviso to sec. 62 (1) of ch. 152, R.S.O. 1887 (the Surveys Act), but was dropped from that Act in the consolidation of it by 1 Geo. V. ch. 42, in accordance with the practice adopted by the Commissioners for the last Revision of the Statutes of not duplicating the same provision.

I do not see any room for question as to the meaning and effect of sec. 44 of 1 Geo. V. ch. 42. The language used is plain —"shall be public highways, streets and commons"—and the

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provision exempting the municipal corporation from the obligation to keep them in repair until established or assumed was not intended to take away from them the character of public highways or streets unless and until they should be established or assumed, and has, in my opinion, no such effect.

There have always been provisions for altering or amending registered plans. At first, under 12 Viet. ch. 35, sec. 41, the owner of lands that had been laid out had the right to amend or alter the plan if no lots fronting on or adjoining any street or common where the alteration should be required to be made had been sold.

The corresponding provision of the present law is to be found in the Registry Act, R.S.O. 1914, ch. 124, sec. 86, which provides that a plan, though registered, is not to be binding upon the person registering it, or upon any other persons, unless a sale has been made according to it, and also provides for amendments or alterations to it being authorised or directed by a Judge; and it also provides (sub-sec. 4) that "no part of a road, street, lane or alley upon which any lot of land sold abuts, or which connects any such lot with or affords access therefrom to the nearest public highway, shall be altered or closed up without the consent of the owner of such lot; but nothing herein shall interfere with the powers of municipal corporations with reference to highways;" and a similar provision (10 Edw. VII. ch. 60, sec. 85(2)) was in force when the by-law in question was passed.

The effect of this legislation and of the provisions of the Municipal Act as to stopping up highways and selling them, was that there were two methods of stopping up highways laid down on a registered plan—one by the mode provided for by the Registry Act, at the instance of the person who registered the plan or of the owner for the time being of the land covered by it, and the other by the passing by the council having jurisdiction over the highway, under the powers conferred by sec. 637 (1) of the Consolidated Municipal Act, 1903, of a by-law stopping it up.

The effect of the action taken differs in the two cases. In the one case, no part of a road upon which any lot sold abuts, or which connects with or affords an access therefrom to the nearest

public highway, can be closed up without the consent of the owner of the lot, and the consequence of closing it up where the road has not been established by by-law of the municipal corporation, or otherwise assumed by it for public use, is, that it belongs to the owners of the land included in the plan and abutting on the road; and in the other case the abutting owners have the option of purchasing the situs of the road at a price fixed by the council; and, if they do not exercise that option, it may be sold by the council to any other person, at that price or a higher one.

In my opinion, the Council of the Township of Tuckersmith had jurisdiction over Mill street—it being, by force of sec. 601 of the Consolidated Municipal Act, 1903, vested in the corporation of that township; and, under sec. 637 (1), the council had power to pass a by-law for stopping it up.

It was argued by counsel for the appellant that Mill street was not a public highway, and in support of that contention *Gooderham* v. *City of Toronto*, 25 S.C.R. 246, was relied upon. In that case some of the lots laid down on the registered plan had been sold, but, at the time when the provision of the Surveys Act now under consideration was made applicable to cities, the whole of that part of the tract that had been subdivided, as to which the question for decision had arisen, with the exception of one lot which was owned by a man named Smith and was held by one of the plaintiffs under a long lease from him, was owned by the plaintiffs, and the whole tract was enclosed as one parcel and used as a pasture-field. As I understand the reasoning of Gwynne, J., who delivered the judgment of the Court, the conclusion to which the Court came was based upon the view that, inasmuch as, before what is now sec. 44 of the Surveys Act became applicable to cities, the plaintiffs had become entitled to all the lots that had been sold, and had therefore acquired the easements or private rights of the purchasers of the lots abutting on streets laid down on the registered plan, the position of matters was the same as if no lots had ever been sold; and, therefore, as by the section it was only where lots of land fronting on or adjoining them had been sold that the streets and commons were made public highways, streets, and commons, they never became public highways, streets, and commons.

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That this was the *ratio decidendi* appears, I think, from the following passage of the report, pp. 261-2: "The language used in the section cannot reasonably be construed as affecting, or as intending to affect, any property so situated as to title as the property of the plaintiff under consideration is, nor, as regards the time past, anything else than roads or streets which at the time of the passing of the Act were then already in existence as private roads, to the use of which purchasers of property abutting thereon were then entitled, which roads and streets so in existence the section under consideration subject to the proviso as to the non-liability of the corporation to keep the same in repair converted into public highways."

In *Roche* v. *Ryan* it was decided by a Divisional Court that, under the Municipal Act and the Surveys Act, by the filing of a plan and the sale of lots according to it abutting on a street, the property in the street becomes vested in the municipal corporation, although it may have done no corporate act by which the corporation has become liable to keep it in repair.

That decision is not affected by the *Gooderham* case; and, so far as I am aware, the correctness of it has never been questioned. The survey which was in question was made in a town; and in *Sklitzsky* v. *Cranston*, 22 O.R. 590, which was the case of a survey of a township lot before sec. 62 of the Surveys Act then in force (ch. 152, R.S.O. 1887) was extended to townships, Street, J., after referring to the decision of the Divisional Court in *Roche* v. *Ryan*, pointed out that that case and sec. 62 had no application to a survey of a township lot, and said: "The plaintiff, however, having purchased his lots as lots laid down upon a registered plan shewing certain streets upon which they abutted, acquired as against the person who laid out the plot and sold him the land, a private right to use those streets, subject to the right of the public to make them highways" (p. 594).

In *In re Morton and City of St. Thomas* (1881), 6 A.R. 323, 329, Burton, J.A., said: "Apart from the Registry Act altogether, no one would thing of disputing the proposition that if a person sells lots according to a particular map or plan, the purchasers acquire an interest in the streets or lanes shewn upon the

plan adjoining the lots sold, which places them beyond vendor's future control to their injury. . . . The purchasers could unquestionably insist upon the lane" (i.e., the lane in question in that case) "being kept open for their use, but is it not clear that by agreement among themselves they could abstain from opening it altogether or enforce its being maintained as a private way?" And he then asks the question: "Does it not follow that the owner might, therefore, under such circumstances by a repurchase of all the lots sold, at all events before any actual use of the lane, re-invest himself with the same rights and dominion over the property which he had before the sale?"—a question that was answered in the affirmative by the Supreme Court of Canada in the *Gooderham* case, and a view with which, judging by what was said by Patterson, J.A. (p. 331), he did not agree. See also Armour on Real Property, p. 71.

In the case at bar, as I understand the evidence, all the lots fronting on Mill street were sold and are still owned by those who purchased them or by persons who derive title from the purchasers, and it is only the street that has been fenced in with the farm which Van Egmond, for whom the survey was made, and those claiming under him, have ever since occupied.

Unless, therefore, when the section was amended so as to include townships, the purchasers of these lots or their assigns had lost their rights or easements over Mill street, that street became a public highway upon the coming into force of the amendment.

It was argued by counsel for the appellants that the non-user of these rights or easements, and the occupation of the street as part of the farm of the adjoining land-owner ever since the plan was registered, have resulted in the loss of these rights or easements; but I am not of that opinion. As Mr. Armour correctly states in his book on Real Property, p. 480: "It has been decided . . . that the Statute of Limitations does not apply to easements. Consequently, there is no bar under the statute for not bringing an action to prevent disturbance of the right. But an easement may be extinguished or abandoned. And it is a question of fact in each case whether there has been an abandonment of the right. Mere non-user is not of itself an abandonment, but is evidence with reference to an abandonment."

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This statement is supported by the decided cases, and is in accordance with the statement of the law in Halsbury's Laws of England, vol. 11, pp. 278, 279, 280, para. 552.

In *Ward* v. *Ward* (1852), 7 Ex. 838, 839, 86 R.R. 852, 853, the right of way had not been used since 1814, and it was said by Alderson, B.: "The presumption of abandonment cannot be made from the mere fact of non-user. There must be other circumstances in the case to raise that presumption. . . . Here the owners of the Stubbing Pits did not use the way in question, for the simple reason that they had a more easy and convenient means of access to that part of their property." And Pollock, C.B., said: "It is a question of fact, and one which could only be found one way. The only inference that could reasonably be drawn from the non-user by this party is, that he had no occasion for it."

In *Crossley and Sons Limited* v. *Lightowler* (1867), L.R. 2 Ch. 478, 482, it was said by the Lord Chancellor (Chelmsford): "The authorities upon the subject of abandonment have decided that a mere suspension of the exercise of a right is not sufficient to prove an intention to abandon it. But a long continued suspension may render it necessary for the person claiming the right to shew that some indication was given during the period that he ceased to use the right of his intention to preserve it. The question of abandonment of a right is one of intention, to be decided upon the facts of each particular case."

In *James* v. *Stevenson*, [1893] A.C. 162, the question was as to a right of way which was granted in 1839. As in the case at bar, there was then no fence existing between the land conveyed and the land retained by the grantor. The action was brought in 1888. Up to that time there had been no user of the northern part of the way. The southern part had been used only on one occasion in 1872, and during all this time the defendant and his predecessors in title had used for farm purposes the land over which the roads would pass, and it was held by the Judicial Committee that these facts were insufficient to shew any intention to abandon the right of way. In stating the opinion of the Board, Sir Edward Fry said (p. 168): "It does not appear that occupants of the plaintiffs' land have ever had any occasion to use

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the northern part of the way, or the southern part, except once, and then they did so use it; and to have required gates to be inserted in the wooden fence at Banksia road and the road to Eltham, when the way was not wanted for use, would have been an unreasonable act, the omission of which cannot be construed as the expression of an intention to abandon the right of way. Nor is the occupation for agricultural purposes of the strips of land subject to the easement, when the easement was not wanted, in the opinion of their Lordships a conclusive circumstance. It is worthy of notice, in reference to this question of abandonment, that ever since the year 1875 the plaintiffs have distinctly asserted their right to the way which they now claim, and if in the earlier period there is no evidence of such assertion, it must not be forgotten that it is one thing not to assert an intention to use a way, and another thing to assert an intention to abandon it."

In a Massachusetts case, *Arnold* v. *Stevens* (1839), 24 Pick. 106, it was held by the Supreme Judicial Court of Massachusetts that in the case of a grant by deed of the right to dig ore in the land of another, which was treated as the grant of an easement, the mere neglect of the grantee, for forty years, to exercise the right, without any act of adverse enjoyment on the part of the owner of the land, did not extinguish the right; and that the occupation and cultivation of the land by the land-owner during that period was not evidence of adverse enjoyment, and that his occupation was consistent with the right of the owners of the easement. In this case the opinion was expressed that the presumption of abandonment and loss by disuse was applicable only to rights acquired by use, and did not therefore apply to rights acquired by grant; but I have found no English or Canadian case in which such a distinction is made.

Applying, then, the principle of these cases to the facts of the case at bar, the proper conclusion is, I think, that the respondents had not lost their right to Mill street. Those of them or their predecessors in title who occupied their lots were also owners of lots on Centre street behind their Mill street lots; and, as Centre street was an open and travelled road, they had no occasion to use Mill street; and, besides this, the evidence leads

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me to the conclusion that Van Egmond and those who derived title to the farm from him always knew and recognised that there was no intention on the part of the owners of the lots fronting on Mill street to abandon their rights in respect of it.

These private rights or easements of course came to an end when Mill street became a public highway, and cannot therefore be relied upon as a bar to the right of the municipal council to close the street. See *Sklitzsky* v. *Cranston*, 22 O.R. at p. 595.

The conclusion having been come to that the part of Mill street which is in question had become a public highway, vested in the appellant corporation, it is undoubted that its council had power to close it: Consolidated Municipal Act, 1903, sec. 637(1).

There is nothing, I think, in the contention that the opponents of the by-law were not afforded an opportunity to state their objections to its being passed. They, or such of them as chose to go to the meeting at which the by-law was to be considered, were heard in opposition to it, and there was nothing to prevent the council, as it did at its first meeting in the following year, from coming to a conclusion as to whether or not the by-law should be passed, without giving the opponents of it an opportunity of again being heard. It is true that the respondent Robinson testified that he did not say all that he could have said, but he was not prevented from doing so, and, as he testified, only refrained from saying more because the solicitor for the corporation, who was present at the meeting, advised the council, or stated, that it had power to close any street. Robinson was not asked and did not state what it was that he would have said, and I am very doubtful of his ability to have added anything of importance to the arguments against the passing of the by-law which he and the other opponents of it had adduced.

Some observations reflecting on the conduct of Mr. Hays were made by my brother Latchford, because, as he thought, of the impropriety of Mr. Hays having acted as solicitor for the appellant Kruse as well as for the appellant corporation.

The only evidence that Hays had acted for Kruse was a statement by Kruse that Hays had prepared for him a petition in connection with the opening of the street. This statement

was made by Kruse when called as a witness at the close of the case. He had not been called by either of the parties, but was called and examined by my learned brother of his own motion, and I doubt whether evidence so taken should be read. It was stated upon the argument that this statement of Kruse was not in accordance with the fact, and that Hays had not drawn the petition or acted for him in any way. However that may be, and assuming that he had drawn the petition, that circumstance, in my opinion, affords no ground for impeaching the by-law, especially as there was no evidence or even a suggestion that Hays said or did anything that was not strictly in the line of his duty as legal adviser to the council.

There is more difficulty as to the question whether, in the circumstances, the by-law is not open to the objection that it was not passed in the public interest, but was passed in the interest of the appellant Kruse, and ought therefore to be quashed; but I have come to the conclusion that there was nothing adduced in evidence to warrant the Court in quashing the by-law on that ground. There is nothing to suggest that the council or any member of it acted in bad faith, by which I mean acted under colour of an intention to serve the public interest, but in reality for the sole purpose of benefiting Kruse.

The part of Mill street which is in question was not required for the use of any one, unless it might be for the purpose of affording another means of access to the lots which front on it, and pressure was being brought on the council to open it. If opened, there would at once have been imposed upon the appellant corporation the duty of keeping it in repair, and liability for damages occasioned by failure to perform that duty. The council evidently, and I think honestly, came to the conclusion that the street ought not to be opened and that the best way to put an end to the agitation for opening it was to close the street and sell it under the powers conferred upon the council by the Municipal Act. They were, no doubt, also influenced in coming to the conclusion to stop up and sell the street by the fact that the appellant Kruse was willing and anxious to become the purchaser of it, and that possession of it, or at all events of the part of it on which his lots abut, was, if not essential, important to

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enable him to carry on his tile business, which was thought to be an industry the carrying on of which would be of benefit to the town in a suburb in which the street is situate.

The questions raised on this branch of the case were under consideration in the recent case of *United Buildings Corporation* v. *Corporation of the City of Vancouver*, 19 D.L.R. 97. In that case a by-law had been passed by the respondents closing up a lane, and the by-law was attacked upon grounds not unlike those upon which the by-law in question in this case is sought to be quashed. The by-law, after reciting that the Hudson's Bay Company owned certain lots and had petitioned the respondents to stop up a portion of a lane running between some of them, and had in return agreed to convey to the respondents other lots to be used for diverting the lane, and also to indemnify the respondents against claims or suits, enacted that that portion of the lane should be closed and stopped up, and that, upon a conveyance to the respondents of the lots last referred to, they would lease to the company the portion of the lane so closed and stopped up, upon the terms and conditions set out in a schedule to the by-law. The respondents had power to pass by-laws for stopping up lanes, and power, without the assent of the electors, to lease portions of lanes for a period not exceeding twenty-five years. The alteration to the lane was made at the instance and on the petition of the Hudson's Bay Company, and strong opposition was made to the petition by the appellants, who, as owners of property abutting on the unclosed portion of the lane, considered their premises to be injuriously affected. Evidence was given on the part of the respondents that the matter was decided unanimously by the Board of Works considering the request a reasonable one and thinking that in the interest of the city it ought to be granted, in view of the class of building which the Hudson's Bay Company proposed to erect and of the facilities offered in return to the other owners of the block in question; and each of three aldermen deposed that, in his opinion, the change improved the access of light to buildings on the lane and did not injuriously affect any of the owners of the other lots. There was no contradiction of this evidence, though there was evidence that the opposite opinion was entertained by other

persons, and it had been held in the Court below, by a majority of the Judges, that the transaction was free from impropriety or bad faith. In stating the opinion of the Board, Lord Sumner said (p. 350): "It is easy, especially for those who conceive themselves to be sufferers by it, to suspect and to suggest and even to argue with some plausibility that such a transaction cannot have been carried through without some improper or sinister motive on the part of those members of the corporation who voted for it, in this case all who were voting: and, since opinions differed on this question in the Court below, their Lordships freely recognise that it might bear one aspect or the other, but judging it, as they must do, upon a judicial survey of the whole proved materials, with the experience of men of the world and the full persuasion that such a charge must be proved by those who make it, their Lordships are unable to differ from the opinion of those members of the Court below who held that the transaction was free from impropriety or bad faith." And the conclusion reached was that, though to those familiar with the *locus in quo* it might seem improbable, or even impossible, that the advantages to be derived from the change in the lane itself were the reason for enacting the by-law, as the plaintiffs had shaped and left their case, it was quite consistent with the possibility that the mere alteration of the lane itself was, partly and even largely, for the general benefit, and was an improvement in the interior communications of the city for the benefit of the public health in a wide sense of the term; and, that being the case, and no bad faith or improper conduct being shewn, their Lordships were unable to say that the decision of the Court below was wrong. In the Court of first instance, Clement, J., was of opinion that the respondents had, under their Acts, the necessary powers, and found that the city council had considered the petition of the Hudson's Bay Company honestly and with regard for the public interest; and, under these circumstances, he held that the Court could not review the decision of the respondents.

In my opinion, what is or is not in the public interest, in a case such as this, is a matter to be determined by the judgment of the municipal council; and what it determines, if in reaching

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its conclusion the council act honestly and within the limits of its powers, is not, and in my humble judgment ought not to be, open to review by any Court. Whether the judgment of the Judicial Committee was intended to go as far as this, I do not know; but, however that may be, it affords satisfactory ground for holding, as I do, that the by-law in question is not open to attack upon the ground that it was not passed in the public interest or in good faith.

The third ground of attack is based on the prohibition contained in sub-sec. 1 of sec. 629 of the Consolidated Municipal Act, 1903, which provides that "no municipal council shall close up any public road or highway, whether an original allowance or a road opened by the Quarter Sessions or by any municipal council, or otherwise legally established, whereby any person will be excluded from ingress and egress to and from his lands or place of residence over such road, unless the council, in addition to compensation, also provides for the use of such person some other convenient road or way of access to the said lands or residence."

All the respondents except Jones, whose lot abuts on Mill street, and Dickson, who does not own any lot on that street, own the lots behind their Mill street lots, which abut on Centre street, and the two lots are occupied as one property, and they have never used Mill street as a means of access to the Mill street lots, but their access to their property is and has always been by way of Centre street, which, as I have said, is and has been for many years an open and travelled road. The effect of the by-law will not, I think, be to exclude these persons from ingress to and egress from their lands or places of residence within the meaning of sub-sec. 1 of sec. 629, as a similar provision was interpreted by the Court of Appeal in *In re McArthur and Township of Southwold* (1878), 3 A.R. 295, in which it was held that it applied only to cases where the only means or convenient means of access is over the road closed up, and not where there is already another means of access though a less convenient one.

Having regard to the fact that the Centre street lots and the Mill street lots are occupied as one property, and, as I have

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said, the only means of access to it which these respondents have ever used has been by way of Centre street, and the fact that, although some of the Mill street lots were sold as many as thirty years ago, no one has ever attempted to use Mill street as a means of access to his property, it must, I think, be held, following the *McArthur* case, that the effect of the by-law, so far as these persons are concerned, will not be to contravene the provisions of sub-sec. 1 of sec. 629.

The lot of the respondent Jones is lot 40, and its only means of access is by Mill street, but he acquired his lot from persons who owned the lot behind it, which fronts on Centre street, after the passing of the by-law. It was said that there had been a verbal arrangement for the sale of the lot to Jones before the by-law was passed; but, if there was, it was made after notice of the intention to pass the by-law was given, and the fact of its having been given had come to the knowledge of Jones; and I strongly suspect that his purchase was made for the purpose of making it impossible to pass the by-law, or to pass it without providing some other means of access to the lot. In these circumstances, the respondent Jones did not, I think, stand in any better position than the other respondents, and the case must be dealt with as if his lot, at the time of the passing of the by-law, had been still owned by the persons who sold to him.

The respondent Dickson, as I have said, does not own any land on Mill street, and he has other means of access to his property.

The by-law is, however, in my opinion, open to the objection that the council had no authority to sell the *situs* of the road without first offering it to the abutting owners at a price fixed by the council, and that it is only in the event of the abutting owners declining to purchase that authority is given to sell to any one else, and then authority is given to sell at that price or a greater one. This is clearly the effect of sub-sec. 11 of sec. 640 of the Consolidated Municipal Act, 1903. My brother Latchford thought otherwise, but he evidently overlooked the fact that sub-sec. 11 includes "selling any road legally stopped up or altered by the council," and that the observations of Burton J.A., in *Cameron* v. *Wait*, 3 A.R. at p. 180, were not directed to the

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provisions of this section, but to sec. 426 of 36 Vict. ch. 48, which now forms sec. 641 of the Consolidated Municipal Act, 1903.

It is contended by counsel for the appellants, in a written memorandum put in since the argument, that the by-law was passed not under the authority of sub-sec. 11 of sec. 640, but of sub-sec. 1 of sec. 637, which makes no such provision as that contained in the other sub-section, as to selling to abutting owners; and it is pointed out, as the fact is, that the words "leasing" and "selling" were introduced into sub-sec. 1 of sec. 637 long after the provisions of sub-sec. 11 of sec. 640 were enacted. It is also contended that the provisions of this later sub-section are permissive, not obligatory.

These contentions are not, in my opinion, well-founded. What the object of introducing the word "selling" into sub-sec. 1 of sec. 637 was, it is difficult to discover; but, whatever it may have been, it is clear, I think, that sub-sec. 11 is applicable whether the by-law is based upon it or upon the other sub-section. It is also clear, I think, that, while the sections are permissive in the sense that it is optional with the council to sell or not to sell, the council, if it determines to sell, is bound to sell in the manner prescribed by sub-sec. 11. That it should be obligatory is manifestly only fair, and it is in accordance with the policy of the legislation as indicated in dealing with the other mode of closing up a highway, by an alteration of a registered plan under the provisions of the Registry Act.

It does not follow, however, that the whole by-law must be quashed. The sale of the street is provided for by sub-sec. 2, and its provisions are severable from the rest of the by-law.

The result is that, in my opinion, sec. 2 of the by-law should be quashed, and the conveyance to the appellant Kruse should be set aside and the registration of it vacated; and the action and the motion, as far as sec. 1 of the by-law is concerned, should be dismissed.

As success is divided, there should be no costs throughout to either party.

*Appeal allowed in part.*

## TEMPLE v. MONTREAL TRAMWAYS CO.

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*Quebec Court of Review, Robidoux, Mercier, and Greenshields, JJ. January 8, 1915.*

1. TRIAL (§ II B—45)—INJURY—NEGLIGENCE — SUFFICIENCY OF QUESTION FOR JURY.

Under the Quebec practice it is sufficient to put to the jury the question whether there was negligence and in what it consisted, and it is not necessary to detail specific faults.

2. TRIAL (§ III E 2—235)—DAMAGES—JURY — PRESIDING JUDGE—SUMMING UP—COMMENT.

In his charge to the jury, the presiding judge at the trial has the right to sum up the evidence and comment upon the facts and connect them with the proper principles of law.

3. TRIAL (§ V A—270)—JURY—FORM OF DECISION — EFFECT GIVEN TO FINDINGS OF.

There is no sacramental form in which the jury may make known its decision on any question and some intelligent effect must be given by the court to the findings of jurors who are not skilled in legal phraseology.

4. PLEADING (§ III A—304)—DEFECTIVE NOTICE—DELAYING TRIAL TILL REMEDIED—AFTER ACTION TRIED NO GROUND FOR SETTING ASIDE—PREJUDICE.

Where a defective notice has been given under a law compelling a notice of injury (with a full detailed statement of such damages) to be given within a certain period before commencement of action, a defendant may, by preliminary exceptions, delay the trial until proper notice has been given, but after the action has been tried on its merits, such defective notice will not be a ground for setting aside the verdict where no prejudice has been proven.

Statement

APPEAL from the judgment of the Superior Court (Mr. Justice Beaudin), rendered on April 24, 1913, on the verdict of a jury.

The plaintiff was a passenger on one of the defendant's cars which was at a standstill on the north side of St. Lawrence Boulevard and Ontario St.; while there, another car belonging to the defendant company came down the hill from Sherbrooke St., and collided with the car on which the plaintiff was seated, resulting in severe injuries to the plaintiff. After issues joined and a jury trial, the verdict was rendered for $2,280, and a judgment was rendered accordingly.

The Court of Review has confirmed the judgment.

*Trihey, Bercovitch, Kearney & Lafontaine*, for plaintiff.

*Perron, Taschereau, Rinfret & Genest*, for defendant.

The judgment of the Court was delivered by

Greenshields, J.

GREENSHIELDS, J.:—The defendant asks for a judgment *non obstante veredicto*, dismissing the plaintiff's action, or sub-

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sidiarily for a new trial, upon the following stated grounds: (1) the assignment of facts in the present case was insufficient and defective, and such as to prevent a trial of the material issues, and defendants' application for a different assignment was overruled before verdict rendered; (2) improper admission of evidence at the trial; (3) misdirection by the trial Judge to which exception was taken, and from which prejudice was suffered by the defendant; (4) the verdict is contrary to law and no fault or negligence is found against the company or its employees—the alleged fault not being a fault in law; (5) the verdict is clearly against the weight of evidence; (6) the amount awarded is excessive; (7) no notice previous to the institution of the action, as required by law, was given; (8) the facts as found by the jury require a judgment in favour of the defendant.

I shall consider these in the order in which they have been mentioned.

As to the *first*, viz.: insufficient assignment of facts. After the issues had been joined, the plaintiff moved for judgment fixing the facts, and suggested questions to be submitted. The defendant submitted and filed its suggestion of questions. The learned Judge before whom the motion came, accepted in their entirety the questions submitted by the defendant, and these questions were the questions which, in practice, at least, before our Courts, have been in matters of this kind almost invariably adopted. The questions in effect are: Whether the plaintiff was injured in an accident which occurred on a certain date; whether that accident was due to the fault of the plaintiff, and if so, in what did it consist: whether the accident was due to the fault of the defendant, or its employees, and if so, in what did the fault consist; whether it was due to the combined fault of the two, and if so, in what did the fault of each consist. Then follows the question of damages.

Now it would seem that after careful instruction to the jury by the learned trial Judge, if they found any fault against the plaintiff, that fault must be a fault alleged against him; if any fault was found against the defendant or its employees, it must be a fault charged by the plaintiff in his declaration;—the

defendant moved the trial Judge to add to the questions whether the defendant was guilty of the various faults charged. That was refused, and I am of opinion properly refused. I am free to concede that no great harm would have been done by allowing the addition, but I am equally of opinion that not the slightest prejudice was suffered by the defendant by the refusal of the application.

It is not necessary under our practice to detail in questions to the jury specific faults; it is sufficient to ask the question, whether there was negligence, and in what it consisted, and with proper direction in law from the trial Judge, a complete and fair trial of the issues can be had.

I am against the defendant on this pretention.

The *second* ground was not persisted in before the Court.

As to the *third* ground, viz.: the presiding Judge has misdirected the jury; (*a*) as to wherein the fault of the company, appellant, lay; (*b*) the amount of damages which should have been awarded to the plaintiff.

Now under art. 472 of the Code, the presiding Judge has the right, if he desires, to sum up the evidence, and to sum up certainly means some degree of comment upon the evidence. Presumably the defendant considers the remarks as an unfair comment and an infringement upon the functions of the jury. The collision between the two cars of the defendant company had been clearly established. A car started from the corner of Sherbrooke St. and went down the hill and came in violent collision with a car at a standstill at the corner of Ontario St.

I take the learned trial Judge's remarks to be nothing more or less than this. A collision took place; a collision should not have taken place, and the fact that a collision did take place between two cars belonging to the defendant, and each controlled by the defendant's employees, was an evidence of presumption of fault amounting to a proof of fault, and it was an instruction by the learned trial Judge in law, viz.: that it was a fault in law to allow two cars belonging to the same company to come into collision, and unless that collision was explained, the fault existed. I take this to be a perfectly correct statement of law, and a perfectly correct instruction to the jury, that

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they could answer yes, the defendant was guilty of negligence because they allowed a collision to take place between two of their cars. I do not find the slightest ground of objection to the learned Judge's statement.

Continuing, the defendant urges a further misdirection by the learned trial Judge. Complaint is made of his remarks on the details of the claim.

In all his remarks, nothing more can be found than a statement of the details of the out of pocket, so to speak, expenses the plaintiff claimed, and upon which the plaintiff had offered proof.

The learned trial Judge had taken note of the various amounts claimed, and he gave to the jury, to refresh their memories, the benefit of the notes he had taken, and he told them clearly that if they found the various amounts as claimed to have been fully proven, they could say so; but he left it entirely to them to find whatever amount they saw fit, or whatever amount they thought had been, in their opinion, proven.

I should rule again against the defendant upon this pretension.

The *fourth* ground, viz.: the verdict is contrary to law, and no fault or negligence found against the company or its employees, the alleged fault is not a fault in law, and the defendant cannot be held responsible in damages towards plaintiff for such alleged facts.

Now, consider what the jury did answer; and first of all, it is useful to observe that by art. 483, C. Proc., it is enacted, that when there is an assignment of facts, the verdict must be special, explicit and articulated upon each fact submitted, for it is said the verdict must be given upon all the issues submitted to the jury.

There is no sacramental form in which the jury may declare, or make known their decision upon any question. In this case they had unanimously decided that the plaintiff had met with an accident, as described in the plaintiff's declaration or claim, viz.: by a collision of two cars, one at a standstill in a certain place, and the other going down a hill and coming in collision, and all the jury meant—and some intelligent effect must be

given to the finding of jurors, who are not skilled in legal phraseology, is, that the car at Sherbrooke St. started down the hill when the other was, before it started, at a standstill, and came down that hill and came into collision; and that is the fault, and that is in law an evidence of a negligent act by some one controlling those two cars.

The jury did not mean, and the jury could not mean, and it is impossible to put that interpretation upon the answer, that the fault consisted in one car starting before another. The fault was, that one car started before the other started and the two came into collision. To nullify the jury's verdict upon such a ground, would, in my opinion, be committing a positive injustice.

As to the *fifth* ground, viz.: The verdict is clearly against the weight of evidence. [Facts.]

The *sixth* ground, viz.: Amount awarded excessive. [Facts.]

The *seventh* ground, viz.: No notice previous to the institution of the action, as required by law and the charter was given.

A notice was given in due time, by which the defendant was notified, that after the expiration of the legal delays, the plaintiff would institute proceedings, giving his address and occupation, to recover damages to the extent of $5,000 which damages were suffered owing to an accident which happened on November 7, 1912, when two cars belonging to the company collided at the corner of St. Lawrence Boulevard and Ontario St. Now, the only objection made by the defendant is that the details of the $5,000 are not given. The article enacted in favour of this company in its own private charter, states that a notice shall be given with detailed statement of such costs or damages. Having received this notice, the defendant waited till the institution of the action, when the plaintiff's statement of claim was served. It contained a detailed statement of the damages. The defendant pleaded to the merits, denying all responsibility, and, moreover, alleging that the notice was not according to law.

The law says that all persons claiming any loss or damages from the company for any cause whatever, shall be bound within a delay of one month before the institution of any action for the prosecution of such costs or damages, to give notice in writing to the company. Now, it will be observed that there is

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not here a denial of action as is contained in some statutory enactments imposing the obligation of giving notice.

Where a statute provides that no action can be taken or no claim maintained, or no judgment rendered without such notice, a failure to give a notice might entail the denial of the plaintiff's right. I should say that the Street Railway being sued, after thirty days from a notice, which in form is defective, could, by preliminary proceedings, stay the progress of that suit until that notice had been complied with; but to dismiss an action such as this because the details of the lump sum had not been given, when there is absolutely no proof of any prejudice, is going the limit which I cannot concur in.

As to the *eighth* ground, viz.: the facts as found by the jury required a judgment in favour of the defendant; and the real effect of the verdict is that the action should be dismissed and that the trial Judge has erred in his interpretation; that the allegations of the plaintiff are not sufficient in law to maintain his action. [This ground was not persisted in before the Court.]

The plaintiff certainly has alleged a fault in law against the company defendant, and the jury has found a fault, and I should confirm the judgment with costs.

*Appeal dismissed.*

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SASK.
S. C.

## ST. PIERRE v. REKERT.

*Saskatchewan Supreme Court, Newlands, Brown and Elwood, JJ. July 15, 1915.*

1. MECHANICS' LIENS (§ III—11)—DELAY IN FILING—INTERVENING LIENS—PRIORITIES.

Sec. 23 of the Mechanics' Lien Act (Sask.), as amended by sec. 4, ch. 38, of the statutes, 1913, providing that the failure to file a lien or to commence action thereon within the statutory period shall not defeat the lien except as against liens registered by intervening parties meanwhile, does not create a priority in favour of intervening liens for work not performed and materials not furnished.

2. COSTS (§ I—7) — FORECLOSURE — MECHANICS' LIENS — SUBSEQUENT ACTIONS.

Where more than one action is brought for the enforcement of mechanics' liens, the person bringing the subsequent action will not be entitled to the costs thereof.

Statement

APPEAL from judgment in action on mechanics' liens.

*A. R. Tingley*, for appellants St. Pierre, Stewart, and Edwards.

*Frame & Co.*, for appellant Crapper.

*R. W. Hugg*, for respondent Cushing Bros.

The judgment of the Court was delivered by

ELWOOD, J.:—This is an appeal from the order of the District Court Judge made in a mechanics' lien action. The respondent Cushing did not file his lien within the time prescribed by sec. 23 of the Mechanics' Lien Act, but subsequently filed his lien under sec. 4 of ch. 38 of the statutes of 1913, which is as follows:

4. Section 23 of the said Act is hereby amended by striking out the word "absolutely" in line two of said section, and by adding thereto the following:—

"Provided, however, that the failure to file such claim or to commence such action within the times mentioned in this and the preceding section shall not defeat such lien except as against intervening parties becoming entitled to a lien or charge upon such land whose claim with respect to said land is registered prior to the registration of such lien or as against an owner in respect of payments made in good faith to a contractor after the expiration of said period of thirty days and before any claim of lien is filed or notice thereof given to the owner.

After the date that the respondent Cushing was entitled to file its lien, and before the actual filing thereof, the appellants filed their liens, but no part of the work for which they became entitled to file their liens was performed and no part of the material for which they became entitled to file their liens was furnished between the last day upon which Cushing should have filed its lien and the date of the filing thereof. It was contended on behalf of the appellants that they, having filed their liens during the time above-mentioned, were entitled to priority to Cushing Bros. by virtue of the above amendment. I am of the opinion that the intention of the above amendment was to allow one who was otherwise entitled to a lien to file it, but at the same time to protect the interests of persons who, after the date upon which the lien should have been filed, and before the actual filing thereof, became entitled to a lien or charge upon the land and who during such period filed such lien or charge. If the intention of the amendment was to give priority to all those who simply filed their lien or charge, no matter when the lien or charge arose, then it would have been, in my opinion, unnecessary to have used in the above section the words "intervening

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parties becoming entitled to a lien or charge upon such land," and the section would have read, "shall not defeat such lien except as against parties whose claim with respect to said land is registered," etc. I am, therefore, of the opinion that the District Court Judge was correct in holding that the appellants are not entitled to priority.

So far as the disposition of the question of costs is concerned, I am of the opinion that the intention of the Act is that there shall be only one action brought, and that where more than one action is brought the person bringing the subsequent action shall not be entitled to his costs of such subsequent action. In the case at bar, however, some of the appellants, prior to the hearing before the District Court Judge, had obtained judgment in default of appearance against the respondent Rekert; and I am of the opinion that the District Court Judge had not power in the proceedings before him to make any disposition of the costs of entering those default judgments, and if the intention of his order was to affect those costs, then the order should be varied in that respect.

So far as the costs ordered to be paid to Cushing Bros. are concerned: the hearing before the District Court Judge was not occasioned by the contention of the appellants, but was under the Act, for the purpose of proving the various claims of the lienholders, and was in consequence of the notice of trial given by the person to whom the conduct of the action was entrusted, and those costs should not have been ordered to be paid by the appellants except in so far as their contest of the claim of Cushing Bros. occasioned further costs. The order of the District Court Judge would appear to go further than that, because it orders the costs of and incidental to the trial to be paid, and in my opinion the costs should be limited simply to the costs of the trial exclusively occasioned by the contention of the appellants that they are entitled to priority to Cushing, and the order of the District Court Judge should be varied in that respect. In other respects the appeal should be dismissed.

So far as the respondent Rekert is concerned, the appellants have failed, except as to varying the order with respect to the costs of the judgments already recovered; and while it is a ques-

tion probably raised by the notice of appeal, it was not discussed on argument before us, and I am, therefore, of opinion that the appellant should pay the respondent Rekert his costs of this appeal.

In my opinion the respondent Cushing should pay the appellants their costs of this appeal.

*Judgment varied.*

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**BROOKLER v. SECURITY NATIONAL INS. CO. OF CANADA.**



*Manitoba King's Bench, Galt, J. June 5, 1915.*

1. GARNISHMENT (§ I C 1—18)—WHAT SUBJECT TO—INSURANCE MONEY.

Under Manitoba K.B. Rules 759 and 761, the claim of the assured under a policy of fire insurance which provided that the loss should not be payable until after thirty days after the completion of the proofs of loss, cannot be attached by garnishing order before completion of the proofs of loss.

[*Lake of the Woods Milling Co.* v. *Collin*, 13 Man. L.R. 154, followed; *Jurcidini* v. *National British, etc., Co.*, [1915] A.C. 499, referred to.]

Statement

APPLICATION for payment out.

*W. J. Wright*, for Hastings.

*R. A. Bruce*, for Robinson and McDougall.

*M. J. Finkelstein*, for Finkelstein, Levinson & Cameron.

*J. Robinson*, for Sadlier.

Galt, J.

GALT, J.:—This is an application on behalf of W. H. Hastings, solicitor for the plaintiff, for payment out of Court of $691.14, the amount of his taxed costs herein as between solicitor and client. The moneys in Court amount to $794 paid in by the defendant company in satisfaction of the plaintiff's claim. Several garnishee orders by other creditors of the plaintiff against the defendant company, and several assignments by the plaintiff to certain creditors of his, were in existence during the pendency of the action which resulted in the payment into Court, and these various claimants were all represented before me upon the application with a view to settling the priorities of their claims.

The amount at stake is small, but the question as to which creditor is entitled to it presents considerable difficulty.

The plaintiff had insured a stock of goods for the sum of

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$3050 in the defendant company. The policy was subject to the statutory conditions, including, amongst others, the following:—

17. Loss shall not be payable until thirty days after the completion of the proofs of loss unless otherwise provided for by the contract of insurance.

18. The company, instead of making payment, may repair, rebuild or replace, within a reasonable time, the property damaged or lost, giving notice of their intention within fifteen days after the receipt of the proofs herein required.

A fire occurred on October 6, 1913. Notice of the loss was at once given to the company, but proofs of loss were not furnished until about December 22, 1913. At this last mentioned date the following claims were in existence:—

1. A garnishing order after judgment at the suit of one Sadlier against Brookler, attaching all debts obligations and liabilities due, owing or payable by the defendant company, or that are accruing and will be due or payable from said company to the said Brookler to the extent of $428.85. This order was obtained on October 9, 1913, and served the same day upon the company, the garnishee.

2. A garnishing order before judgment at the suit of one Dr. Rorke, against Brookler, attaching all debts, obligations and liabilities due, owing or payable by the defendant company, or that are accruing and will be due or payable from said company to the said Brookler to the extent of $245. This order was obtained on November 5, 1913, and served the same day upon the company, the garnishee.

Two other garnishing orders were subsequently issued by Forsyth-Kimmel, and the city of Winnipeg, but owing to the small amount in Court and the large amount of the other claims, there is no occasion to deal specifically with these later ones.

3. On December 10, 1913, Messrs. Finkelstein, Levinson & Cameron wrote a letter to the defendant company enclosing a so-called order from Brookler on the Security National Ins. Co. in favour of themselves for the sum of $109. The order reads as follows:—

Dec. 1st, 1913.

Security National Insurance Company, Winnipeg.

Dear Sirs,—Please pay to Messrs. Finkelstein, Levinson & Cameron the sum of $109, and for so doing this shall be your authority.

Yours truly, (Sgd.) M. J. BROOKLER.

4. On December 15, 1913, Messrs. Steinkopf & Bruce wrote a letter to the defendant company, which was received in due course, enclosing two orders or assignments in favour of Reuben Simon Robinson and A. McDougall & Co. respectively, which read as follows:—

In consideration of $398.65, I hereby transfer, assign and set over unto Reuben Simon Robinson of the City of Winnipeg in the Province of Manitoba, the proceeds of the insurance policy in my favour in the Security National Insurance Company, No. 9505, to the extent of $398.65 and interest thereon from date hereof until payment at 8 per cent. I authorize the Security National Insurance Company to pay same to the said Reuben Simon Robinson and let this be their authority and discharge for so doing. Dated at Winnipeg, this 15th day of October, 1913.

The assignment to A. McDougall & Co. is exactly similar to the last mentioned one, but is for the sum of $358.23, and is dated October 22, 1913.

So far as regards the claim of W. H. Hastings, solicitor for the plaintiff in the action in which the sum of $794 was recovered, no objection has been urged before me to its allowance. I therefore allow this claim as being first in priority at the sum of $691.14.

As regards the remaining claims, perhaps the most satisfactory method of dealing with them will be to eliminate, one by one, those which I consider disentitled to priority.

The claim advanced by Dr. Rorke is subsequent to the Sadlier garnishing order, and it possesses no features which would give it priority. Consequently I eliminate it. For the same reason I eliminate the two later garnishing orders in favour of Forsyth-Kimmel and the City of Winnipeg.

The so-called order in favour of Messrs. Finkelstein, Levinson & Cameron appears to me to fall directly within the decision of the Court of Appeal in Ontario in *Hall* v. *Prittie*, 17 A.R. (Ont.) 306. It is not in truth an order or assignment at all, but is simply a bill of exchange, and not having been accepted in writing by the defendant company, it is not entitled to rank.

The assignments in favour of Robinson and McDougall & Co. are of later date than Sadlier's garnishing order. They are dated respectively October 15 and 22, and were delivered to the defendant company on or about December 15, 1913. If the

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Sadlier garnishing order be invalid for any reason, the first of these assignments in favour of Robinson would be entitled to prevail, and it would exhaust the balance of money in Court. Counsel for Robinson contends that his client's claim is entitled to priority in view of the judgment of the full Court of King's Bench in *Lake of the Woods Milling Co.* v. *Collin*, 13 Man. L.R. 154 (1900).

In that case an application was made on behalf of the defendant and his assignee to set aside a garnishee attaching order which had been made in favour of the plaintiffs against the defendant and certain fire insurance companies. The order was in the form given by 60 Viet. ch. 4, directing that "all debts, obligations and liabilities owing, payable or accruing due" from the garnishees be attached to answer the judgment to be recovered.

The main objection which concerns the present application was that there were no attachable debts from the insurance companies or any of them to the defendant. The Court held that under Rules 741 and 742 of the Queen's Bench Act 1895, as amended by 60 Viet. ch. 4 (which rules correspond with our rules 759 and 761) the claim of the assured under a policy of insurance against loss by fire which provided that the loss should not be payable until 30 days after the completion of the proofs of loss usually required, could not be attached by garnishing order before such completion, although the property insured had been burnt. The Court also held that the only kind of liability which can be attached under the above rules is a purely pecuniary one, and must be absolute and not dependent upon a condition which may or may not be fulfilled, and therefore, when a policy of fire insurance contained a condition giving an option to the company to replace the destroyed property instead of paying the insurance money if they should so decide within a certain time, the garnishing order would be of no avail, if served before the expiration of that time, as an attachment of the insurance money since it would not then be certain that any pecuniary liability would ever arise under the policy.

At the date of the above judgment rule 746 (now rule 764) was in existence. It reads as follows:—

If the claim or demand be not due at the time of the attachment an order may be made for payment thereof at maturity and execution may issue therefor when it matures.

It is somewhat remarkable that this rule was not referred to by either of the learned Judges who delivered judgments, as it appears to have a material bearing upon the case. Counsel for the appellant, in his argument, said:—

Rule 746 is still in force and explains the previous part of the statute. Evidently it is only a liability certain and not contingent that is intended.

Probably the Court took this view of the rule but the Judges do not say so.

It is not difficult to suggest more than one set of circumstances which would distinguish any given case from *Lake of the Woods Milling Co.* v. *Collin*, 13 Man. L.R. 154. For instance, as regards statutory condition 18 (which allows the company the right to elect to repair, rebuild or replace the property damaged or lost), could such a condition be reasonably or fairly applied to such property as was insured in the present instance; namely, "raw and manufactured furs, cloths, trimmings, store and office furniture and fixtures, etc.?" Or suppose that the insurance company, promptly after the fire, repudiated its liability entirely, would not this have the effect of absolving the insured from compliance with any conditions precedent contained in the policy and so be an answer to the defences set up in such cases as *Lake of the Woods Milling Co.* v. *Collin*, or in applications such as the one before me? See the very recent judgment of the House of Lords in *Jureidini* v. *National British & Irish Millers Ins. Co.*, [1915] A.C. 499. If such were the attitude adopted by the defendant company in this case the parties failed to disclose it, and I am of course bound by the decision of our Full Court above mentioned.

For this reason I hold that Sadlier's claim under the first garnishing order is ineffectual and that priority must be given to Reuben Simon Robinson under his assignment, dated October 15, 1913.

I therefore order that the moneys in Court be paid out: firstly,—To the extent of $691.14 in favour of W. H. Hastings.

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The applicant W. H. Hastings is entitled to the costs of this application and order, which I hereby fix at $12.86; secondly,—That the balance of the money in Court, namely, $90, be paid out to Reuben Simon Robinson.

*Order accordingly.*

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N. S.

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## PICTOU v. TOWN OF NEW GLASGOW.

*Nova Scotia Supreme Court, Sir Charles Townshend, C.J., Graham, E.J., Longley, and Drysdale, J.J. February 13, 1915.*

1. DEEDS (§ II B—25)—DESCRIPTION OF PARTIES—NAME OF CORPORATION—DISCREPANCY.

A corporation's name in a grant, even if there is a variance, will be sufficient if it is substantially correct and it is the corporation intended.

[*Bruce* v. *Cromar*, 22 U.C.Q.B. 321; *Hawkins* v. *Perth*, 2 U.C.C.P. 72; *Moore* v. *Bradley*, 5 Man. L.R. 49, referred to.]

Statement

APPEAL from the judgment of Russell, J.

*E. M. Macdonald*, K.C., and *H. Mellish*, K.C., for appellant.

*T. S. Rogers*, K.C., and *H. K. Fitzpatrick*, for respondent.

Townshend, C.J.

TOWNSHEND, C.J.:—I concur with my brother GRAHAM.

Graham, E.J.

GRAHAM, E.J.:—There were at all material times three townships in the county of Pictou, viz., Pictou, Egerton and New Glasgow. By ch. 68 of the Revised Statutes (1st series) (1851) there were provisions for the appointment by the grand jury and sessions of three persons (on the application of twenty freeholders) to be supervisors of public grounds, thereby constituted a body corporate by the name of the Supervisors of Public Grounds for the township of . . . The legal title of and in all public parade grounds . . . and other lands not belonging to the county or district (some districts had a Court of Sessions) at large but which may be acquired or had for the general purposes and uses of the inhabitants of such township and of and in all buildings thereon being and appurtenances, etc., shall on their appointment vest in the supervisors for the original purposes for which they were intended. . . .

It would appear that the township of Egerton purchased for a market in the capital town of the township of Egerton, New

Glasgow, a bit of land for a market place, and the Sessions had assessed the price, £250 in all, on the township of Egerton, not on the county or on any other township.

Under the statute I think that the land was vested in the corporation of supervisors for the use of the inhabitants of the township as a market place the moment they were appointed.

It is important, I think, that the assessment of Egerton and the appointment of the men to constitute the corporation were made at the same term. By the statutes the appointments of either trustees for the county or supervisors for a township were not required to be made annually, but, once appointed, only vacancies required to be filled. Therefore, on the eve of the acquisition of this property by the township and before the necessity for appointing all then, because none had been ever required before, all these were appointed. The proceedings of that term are to be read together.

No doubt trustees for public property of the county with other public buildings had been appointed long before. There is no evidence to the contrary. But if by reason of vagueness in the description in the minutes (the resolution may have been all right) we cannot say that the land did actually vest in this appointment; there was a deed taken. It is a deed between Carr and the Bells of the one part and James Fraser and "Alexander Fraser of New Glasgow, aforesaid Esquires, and James W. Carmichael of the same place, merchant, the successors and trustees of public property in said township of Egerton in the county of Pictou, of the other part." The consideration is £250, and the grant and the habendum was to them by name, "Supervisors and trustees as aforesaid, their successors in office, and assigns forever."

Now, it is evident that there is a great variety in the records as to the titles by which the three men were designated, supervisors, trustees, commissioners, and in one case "Commissioners or trustees," shewing that accuracy was not even attempted.

And in 1854 these people themselves, under their signatures, have written, "Trustees of Public Property, Township of Egerton."

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But the facts point to these three men as constituting the Supervisors of Public Grounds for the township of Egerton.

One of the witnesses says that the records would indicate that Egerton and New Glasgow were used interchangeably.

It is admitted in the case that the consideration £250 was assessed and levied on the township of Egerton. These men were New Glasgow men, and it would not be likely that this would happen if the appointment was of trustees for county property. It would be a strange thing with this statute automatically vesting the property on the appointment that this property of the township, then authorized, should be intended to vest in any other than those appointees.

I think the description in the deed is more applicable under the circumstances to the corporation for the township than that for the county. A corporation's name in a grant, even if there is a variance, will be sufficient if it is substantially correct, and it is the corporation intended: *County of Bruce* v. *Cromar*, 22 U.C.Q.B. 321; *Hawkins* v. *Perth and Bruce*, 2 U.C.C.P. 72; *Moore* v. *Bradley*, 5 Man. L.R. 49; *In re Inhabitants*, 10 N.J.L. 384, and the English cases cited in these cases; also Angell and Ames on Corporations, sec. 99, sec. 234.

On September 3, 1855, a piece of land 1 acre, 1 rod and 10 sq. poles in extent, lying alongside of the former lot was acquired, and the consideration was £100. This deed is taken to James Fraser, one of these supervisors, but in his private name, and the whole has been held as one lot for the common purpose, a market square in the town of New Glasgow.

In 1867, a lock-up house was built by the commissioners of the lock-up. Apparently the building also consisted of a Court House, probably a police station.

It was erected on this market square—in fact on the Carr-Bell lot. It cost upwards of $6,000.

By virtue of an agreement made between the municipality of Pictou and the town of New Glasgow of April 18, 1900, confirmed by Acts of 1901, ch. 119, this building and its site, no doubt, were transferred to the town of New Glasgow, subject to the conditions in the agreement mentioned. It is not the subject of dispute.

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Then a market house was erected on the same lot. It was completed in 1878, and, pursuant to resolutions of the Court of Sessions of Pictou County, passed in 1874, 1875, 1876, and 1878, the cost thereof was defrayed by general assessment and levied on the county of Pictou at large.

In the year 1875, the town of New Glasgow was incorporated, Acts of 1875, ch. 49.

By sec. 53 it was provided that:—

All property, real and personal, which at the passing of this Act shall be public property or which shall have been held in trust in any way for the town of New Glasgow shall, on the passing of this Act, be the property of the town.

Later, in 1879, a general incorporation of the county took place.

Then, on May 6, 1885, a lease was made, running from June 1, 1885, for 21 years, by which the market square and market building thereon purported to be demised by the municipality to the town for a nominal rental of 25 cts. per annum and certain covenants on the part of the town.

In 1886, ch. 105, consolidating the incorporating Act of New Glasgow was passed, and I shall quote sec. 45 presently. This Act was repealed by Acts of 1888, ch. 1, but, by sec. 65, its effect as to the vesting of town property was retained. I think that the mere repeal of the other Act would not affect the title to property vested under it.

In this kind of action to recover land it is very old doctrine that the plaintiff must rely on the strength of his own title and not on the weakness of his adversary's.

First, turning to the statutes which are said to have vested this land in the municipality, see 1879, ch. 1, secs. 48 and 55.

In my opinion, these provisions did not include these lands by that description. This land was not "property belonging to the municipality" if my point is good that the money was raised by the township of Egerton for a market square. Neither was it vested in the trustees of public property for any county because, referring back to R.S. (1st series) ch. 97, (the vesting section) this land was not "land granted . . . procured or used for public purposes of the county or district generally."

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In the consolidation of 1884, R.S. (5th series), these provisions find a place in ch. 56, secs. 55 and 56, and they have been changed. Sec. 56 is as follows:—

All lands granted, conveyed . . . or which may have been procured or for twenty years before the passing of this chapter, shall have been used in the county or district whether for the site of any court house (by reference to the preceding section this obviously means the municipality "court house") jail or lock-up house or for the public purposes of the county or district generally with the buildings and appurtenances thereon or thereto belonging, and all the lands and buildings hereafter procured or given for the public purposes of the county or district and heretofore were vested in the trustees of public property shall vest in the municipality for the public uses for which the same may have been originally intended.

By sec. 59 it was provided that nothing in the four next preceding sections should affect (in effect) any church lands, school lands, "or any lands vested in the supervisors of public grounds under the chapter of Supervisors of Public Grounds (ch. 59).

But perhaps this exception does not affect the argument.

I think that the market square in New Glasgow did not pass under these provisions to the municipality. Before these provisions were passed, namely, in 1875, the town of New Glasgow was incorporated and the area of the town site *primâ facie* would not be included in provisions relating to the county.

Then it cannot be said that this land procured by the township of Egerton out of its funds for a market in New Glasgow was "procured" or "used for public purposes in the county," or "for the public purposes of the county or district generally."

Only such land was to vest in the municipality for the public uses for which the same were originally intended. Pictou had a market square or market house and New Glasgow was getting one.

Then we have the drastic provisions of the Consolidated Incorporation Act of the town of New Glasgow. The Acts of 1886, ch. 105, sec. 45, as follows:—

The town council shall exclusively have, possess and enjoy and exercise within the town all jurisdiction, power and authority, which, but for the corporation of such town would or could be exercised therein, or over or in respect thereto by the county council, the town meeting, the school meeting, the grand jury, the trustees of schools, supervisors of public grounds, overseers of poor and commissioners of streets or highways, and

all lots, pieces and parcels of land, and all buildings and erections thereon, which at any time were granted and conveyed or were originally laid out or allotted to the town or to any person or persons or corporations in trust for the town, or for the inhabitants thereof, or for any public use in said town, or which have been or are in any way held in trust for the town or the inhabitants thereof, or for any public use in said town, and all lots, pieces and parcels of land lying within the limits of the town, which at any time heretofore have been granted, conveyed, demised or leased, or which were originally allotted or laid out to the township in which the town is situate, or to any person or persons in trust for said township or for the inhabitants thereof, or for any public use or purpose in said town, and any property heretofore declared by the Act of the legislature to be the property of the town or under the control of the town council shall become and be the public property of said town, and shall be under the exclusive control and management of the town council thereof.

I think the facts, as I have hereinbefore stated them, tend to shew that the land did not vest in the municipality but in the town of New Glasgow.

The building of the market upon the square by the commissioners or supervisors out of money levied on the county generally, only points to some such agreement since a market was an advantage to the producers outside of that township (say the township of Maxwelton as well as Egerton) one should provide the site and the municipality the building. And the arrangement was made that while New Glasgow was to pay the premiums of fire insurance on this building the avails in case of burning should go to the municipality of Pictou. If there are any moral considerations, or even equities, owing to placing a building on another's land, they are not to be inquired into in this action to recover land.

This brings me to the 21 years' lease which I have already mentioned. It appears that sometime before the term expired the town asked to have a renewal and the municipality did not accede to that request.

There was a notice to quit October 25, 1911, and a reply repudiating the tenancy in November on the ground that the defendant had the title. And so the tenancy expired June 2, 1912, and after it expired this action was brought.

There is no estoppel of course after the lease expires, and the tenant need not go out of possession: *Accidental Death Insurance Co.* v. *Mackenzie*, 5 L.T. 20, 10 C.B.N.S. 870.

In my opinion the appeal should be dismissed.

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LONGLEY, J.:—This is a case to determine the ownership of a certain parcel of land with a market building upon it, situate in the town of New Glasgow. The circumstances are something as follows: The municipality of Pictou in the year 1853 appointed one James Fraser, Alex. Fraser and James W. Carmichael to be the trustees of public property, and to these persons was conveyed a portion of the land in the town of New Glasgow which is involved in the present suit, and also on the 3rd day of September, 1853, Matheson conveyed to James Fraser a certain piece of land adjoining that already conveyed, and which has been held as public property ever since.

The municipality of Pictou erected a Court House in the year 1867, erected a lock-up in 1868, and had erected a market long before any incorporation of the town took place.

The courthouse and lock-up may not be considered in this case because they have been disposed of according to an arrangement made between the town and the county and that has been ratified by the legislature, and that part of the property involved does not concern this suit. What does concern it is that the market place, and the large block of land upon which this market is situate, and the ownership is being contested by these two parties. It was in the municipality beyond all question I think. This Court will have to consider all the circumstances and see if there are any which tend to vest this land in the town of New Glasgow. In 1875, New Glasgow was incorporated by a special Act of the legislature of Nova Scotia, and certain words were put in the Act of incorporation providing that "all property, real and personal, which at the passing of this Act shall be public property, or which shall be held in trust in any way by the town of New Glasgow shall, on the passing of this Act, become the property of the town." This property could not be said to pass under any such arrangement as that and this Act and all similar Acts incorporating towns will only vest in the town that feature of public property which was manifestly in the town and used for town purposes, whereas the courthouse, lock-up and market were erected at the cost of the county, and arrangements were made by the county for keeping them up.

In 1885, the town of New Glasgow and the municipality of Pictou entered into a solemn agreement whereby the municipality of Pictou conveyed certain lands and premises in the town of New Glasgow "now," it was said in the document, "the property of the municipality of the county of Pictou." This was for 21 years and lasted until 1906. When it expired, the municipal council declined to enter into any future arrangements in regard to this property, and claimed it as their property, and the municipal council gave them notice on the 25th October, 1911, to quit the occupation of said market building and square and to hand them over to the county. The town council of New Glasgow, on November 28th, 1911, passed a resolution declining to give up this market building, stating that the former lease which had been made to the town was made under a mistake of the law in regard to the ownership of such building.

Now, the various documents are before us and the old records of the county of 1853 and 1855, and we are called upon to determine at this date whether the market premises and the land on which they are situated belong to the town of New Glasgow or to the county of Pictou.

I can find nothing in the Act which would tend to take the land out of the county of Pictou unless it be the Act of 1886 which consolidated and amended the Acts relating to the town of New Glasgow. Sec. 45 of that statute contains a statement in relation to town property in the town of New Glasgow which is somewhat exceptional in its character, and may have the effect of giving legislative authority to the transfer of the ownership of property. This Act was repealed by ch. 1 of the Acts of 1888 which puts all the incorporated towns under one Act. But sec. 65 of this Act deals with the property vested in the town and although not so full as sec. 35 of 1886 therein repealed, yet it contains the following words:—

and any property heretofore declared by Act of the legislature to be the property of the town or under the control of the town council.

The Act of 1886, I feel satisfied, vested this property in New Glasgow, and its repeal would not affect its operation unless it was mentioned to do so.

I am therefore inclined to the belief that the property in

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question is vested in the town of New Glasgow and that the appeal herein should be dismissed.

DRYSDALE, J.:—I concur both in the reasoning and in the conclusion of the opinion read by my brother Graham.

*Appeal dismissed.*

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ALTA.
S. C.

## GRAY v. NATIONAL TRUST CO.

*Alberta Supreme Court, Harvey, C.J. June 30, 1915.*

1. MARRIAGE (§ IV B—55)—ANNULMENT—PROHIBITED DEGREES OF CONSANGUINITY—EFFECT OF DEATH.

The validity of a marriage voidable on the ground that the parties were within the prohibited degrees of consanguinity, such as uncle and niece, can only be questioned during the lifetime of both parties, and cannot be attacked by the next of kin of the deceased spouse.

[*Re Murray Canal; Lawson* v. *Powers* (1884), 6 O.R. 685; *Kidd* v. *Harris* (1901), 3 O.L.R. 60, followed.]

Statement

ACTION for the declaration of the invalidity of a marriage.

*C. H. Grant*, for plaintiff.

*N. C. Willson*, for defendants.

Harvey, C.J.

HARVEY, C.J.:—Twenty years ago George Gray and Eliza Gray came from Ontario to this district together as man and wife. They lived and struggled together for seventeen years and gathered together some property, and had born to them five children when death overtook the father and main provider. The National Trust Co. is the administrator of his estate. The plaintiff is his brother, and he sues on behalf of himself and the other brothers and sisters who are named in the statement of claim, and who number in all eight, of whom four beside the plaintiff reside in Ontario, and one, Mary Bulmar, resides in Edmonton South, the place of residence of the family of the deceased.

The purpose of the action is to have it declared that George Gray and Eliza Gray were not man and wife, and that the brothers and sisters of the deceased are the persons entitled to the property he left, with the result that the supposed widow will be deprived of all interest in the property which she helped to accumulate, and the infants will be deprived not merely of the property which their father, through oversight in not making a will, has left unguarded from such attacks as this, but also, of their good name,

and will have attached to them a stigma that will endure to the end of their lives.

The heartlessness of such an attempt made by uncles and aunts, and the cruel injustice of such a result, whatever may have been the faults of the parents, are such that a Judge will with the utmost reluctance aid in its accomplishment. The Courts, however, are bound to administer the law as they find it, even though it works an injustice, the Legislature being the only proper body to make the law just.

The application is made to me for judgment on the admissions in the pleadings and the examination for discovery of the adult defendant. It came on several months ago, but I reserved it until there should be a sitting of the Legislature, so that if desired legislation could be passed which would prevent the injustice which is sought to be worked. The sitting has been held and no legislation has been passed, and it becomes necessary for me to deal with the case in the law as it was and still is. Fortunately I find myself able for the present to prevent the iniquity which the plaintiff is seeking to perpetrate, but unfortunately the action must proceed, and whether at the trial the facts may be shewn to be such that the innocent children have no protection cannot now be foreseen.

The ground on which the application is based is that Eliza Gray was the daughter of one of the brothers of the deceased in whose behalf this action is brought, and this fact is admitted by the defence.

If an attempted marriage between Eliza Gray and George Gray had taken place in this province or in the N.W.T. it would have been "absolutely null and void to all intents and purposes whatsoever," in the words of the Imperial Statutes, 5 & 6 Wm. IV., ch. 54, sec. 2, because they were within the prohibited degrees of consanguinity, and the children of any such marriage would have been illegitimate, and though they would by our law have had a right to the property of an intestate mother they would have had no such right to the property of an intestate father. Whether there was any marriage which would have been valid but for the relationship of the parties is a question upon which the plaintiff desires to go to trial, but if there was it was before the parties came to this part of the country when they were

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domiciled in Ontario, and consequently its validity is to be determined by the law of Ontario.

It was agreed by counsel that I should determine the law of Ontario in the same manner as I would determine the law of this province.

The law of England was introduced into Ontario at a date prior to the passing of the statute I have mentioned (1835), when the law was as set out in its preamble, which commences:—

> Whereas marriages between persons within the prohibited degrees are voidable only by sentence of the ecclesiastical court pronounced during the lifetime of both the parties thereto.

The statute had no application to Ontario, and it has been held there at different times since that the validity of a marriage on the ground that the parties were within the prohibited degrees can only be questioned during the lifetime of both parties. See *Re Murray Canal; Lawson* v. *Powers* (1884), 6 O.R. 685, and *Kidd* v. *Harris* (1901), 3 O.L.R. 60. That is the law applicable to this branch of the case and to this application, and it follows that the plaintiff cannot succeed on this ground, and the application is therefore dismissed. As the application is coupled with the usual application for directions, I will allow the defendants the costs of the motion as an opposed motion, in the cause in any event. As the order for directions must be made, the plaintiff would be entitled, in the event of his recovering the costs of the action, to the costs of this application as of an unopposed application.

*Action dismissed.*

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ONT.
S. C.

**Re OTTAWA AND NEW YORK R. CO. AND TOWNSHIP OF CORNWALL.**

*Ontario Supreme Court, Meredith, C.J.O., Clute, Riddell, and Sutherland, JJ. April 26, 1915.*

1. TAXES (§ III B 2—132)—ASSESSMENT AND VALUATION—RAILWAY STRUCTURES—BRIDGES.

A railway bridge constructed across a river in pursuance of a Crown grant is a "structure on railway lands" within the meaning of sub-sec. 3 of sec. 47 of the Assessment Act, R.S.O. 1914, ch. 195, exempting same from assessment by the township municipality.

2. WATERS (§ I C 4—47)—CROWN GRANT—RAILWAY BRIDGE ACROSS RIVER—EXTENT OF GRANT.

The ownership of the Crown in the soil and freehold of the bed of a river and of the islands therein extends *usque ad cælum*, and a grant by the Crown of the right to construct and maintain a railway bridge across such river carries with it the ownership of so much of the soil as is occupied by the superstructure as well as by the piers.

APPEAL from an order of the Ontario Railway and Municipal Board.

*W. L. Scott*, for appellants.

*G. I. Gogo*, for the Corporation of the Township of Cornwall, respondent.

The judgment of the Court was delivered by

MEREDITH, C.J.O.:—This is an appeal by the Ottawa and New York Railway Company, the New York and Ottawa Railway Company, and the New York Central Lines, from an order of the Ontario Railway and Municipal Board dated the 7th October, 1914, confirming the assessment of that part of the company's bridge over the river St. Lawrence which is within the township of Cornwall.

The question for decision is as to the liability to assessment under the Assessment Act, R.S.O. 1914, ch. 195, of this bridge. It was built by the Ottawa and New York Railway Company, which was incorporated by an Act of the Parliament of Canada. The part of it which lies within the State of New York was built by an American corporation, the Cornwall Bridge Company; and, in order that the two sections of it might be operated uniformly, the whole of the bridge is leased to a holding company incorporated in the United States, the New York and Ottawa Bridge Company.

The section of the Assessment Act which deals with the assessment of railways is sec. 47.

By sub-sec. 1, every steam railway company is required to transmit annually to the clerk of every municipality in which any part of the roadway or other real property of the company is situate a statement shewing:—

"(*a*) The quantity of land occupied by the roadway, and the actual value thereof (according to the average value of land in the locality) as rated on the assessment roll of the previous year;

"(*b*) The vacant land not in actual use by the company and the value thereof.

"(*c*) The quantity of land occupied by the railway and being part of the highway, street, road or other public land (but not being a highway, street or road which is merely crossed by

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the line of railway) and assessable value as hereinafter mentioned of all the property belonging to or used by the company upon, in, over, under, or affixed to the same.

"(*d*) The real property, other than aforesaid, in actual use and occupation by the company, and its assessable value as hereinafter mentioned."

Sub-section 2 provides that the assessor shall assess the land and property mentioned in sub-sec. 1 as follows:—

"(*a*) The roadway or right of way at the actual value thereof according to the average value of land in the locality; but not including the structures, substructures, and superstructures, rails, ties, poles and other property thereon;

"(*b*) The said vacant land, at its value as other vacant lands are assessed under this Act;

"(*c*) The structures, substructures, superstructures, rails, ties, poles and other property belonging to or used by the company (not including rolling stock and not including tunnels or bridges, in, over, under or forming part of any highway), upon, in, over, under or affixed to any highway, street or road (not being a highway, street or road merely crossed by the line of railway) at their actual cash value as the same would be appraised upon a sale to another company possessing similar powers, rights and franchises, regard being had to all circumstances adversely affecting the value including the non-user of such property; and

"(*d*) The real property not designated in clauses (*a*), (*b*) and (*c*) of this sub-section in actual use and occupation by the company, at its actual cash value as the same would be appraised upon a sale to another company possessing similar powers, rights and franchises."

By sub-sec. 3 it is provided that "notwithstanding anything in this Act contained, the structures, substructures, superstructures, rails, ties, poles, wires and other property on railway lands and used exclusively for railway purposes or incidental thereto (except stations, freight sheds, offices, warehouses, elevators, hotels, roundhouses and machine, repair and other shops) shall not be assessed."

And sub-sec. 5 provides that "a railway company assessed

under this section shall be exempt from assessment in any other manner for municipal purposes except for local improvements."

The view of the Board was that the river St. Lawrence is not a highway within the meaning of sec. 47; and that, as by the interpretation section of the Assessment Act "land" and "real property" include "buildings, or any part of any building, and all structures, machinery and fixtures, erected or placed upon, in, over, under, or affixed to, land," the bridge is land and real property within the meaning of sec. 47, and does not fall within clauses (*a*), (*b*), or (*c*) of sub-sec. 2, but within clause (*d*), and is assessable as provided by that clause.

The Board was also of opinion that the bridge is not a structure on railway lands within the meaning of sub-sec. 3, and that, it is said, was admitted by counsel for the appellants.

Upon the argument before us, counsel for the appellants contended that the bridge is on railway lands within the meaning of sub-sec. 3, and that it is also a bridge over a highway, merely crossed by the line of the railway, within the meaning of clause (*c*) of sub-sec. 2, and is therefore not liable to assessment.

As appears from the plan filed, the bridge on the Canadian side rests upon an abutment built on the railway company's land adjoining the Cornwall canal, which is crossed by a drawbridge. There is then a cantilever span crossing the north channel of the river St. Lawrence, and resting at the south end upon a pier built on Cornwall Island, which is or forms part of an Indian Reserve, and lies between the north and south channels of the river. There are three piers supporting the drawbridge, one at the north end of the canal, another about the centre of it, and the third at its south end. The cantilever span crossing the north channel is supported by two piers built into the bed of the channel, a pier at the southerly end of the channel and the pier at the south end of the canal. The railway is then carried across the island for about the northerly one-third of the distance in a cutting, for the next or middle one-third on practically level ground, and for the southerly one-third on a solid earthen embankment, with one wooden trestle of about thirty feet in length, across a cattle pass, and at the

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southerly end of the island there is a pier, upon which rests the northerly end of a bridge which is built over the southerly channel of the river.

The erection of the bridge having been authorised by the Parliament of Canada, it must be assumed for the purposes of the case that it is a lawful structure, that the railway company is entitled to maintain it as it has been constructed, and that its occupation of the soil by the piers and by the superstructure, in so far as the latter occupies the land of the Crown, is a lawful occupation; and, that assumption being made, the bridge is, in my opinion, a structure on railway lands within the meaning of sub-sec. 3.

The Crown was the owner of the soil and freehold forming the bed of the river St. Lawrence and of the islands; and that it could grant the right to build the piers there, is not open to question; nor is it open to question that, as the ownership of the soil extends upwards to an indefinite extent (*cujus est solum, ejus est usque ad calum*), a grant of the right to construct and maintain the bridge is a grant of that part of the soil occupied by it; and, therefore, for the reasons already given, the railway company is the owner of so much of the soil as is occupied by the superstructure as well as by the piers; and it follows that the bridge is a structure on railway lands within the meaning of sub-sec. 3.

I cannot doubt that if a railway company, proposing to erect a viaduct for the purpose of carrying its track, instead of acquiring the land out and out, should acquire from the owner of the land only the right to construct the viaduct at a stipulated height above the surface of the land, with the necessary piers to support it, the company would be the owner of the land occupied by the viaduct and the piers, and it would constitute railway lands within the meaning of sub-sec. 3; and I can see no difference in principle between such a case and the acquisition by the railway company of the right to erect the bridge in question, although it is built over a navigable river.

That an upper room not resting directly upon the soil but supported entirely by the surrounding parts of the building may at common law be the subject of a feoffment and livery as a

corporeal hereditament, that is to say, as land, is undoubted: Co. Litt. 48; Sheppard's Touchstone, 8th ed., p. 206; 1 Preston on Estates, p. 8. And that the right of the owner to the room may be extinguished by the operation of the Statute of Limitations was decided in *Iredale* v. *Loudon* (1908), 40 S.C.R. 313.

Just as in the case of *Consumers Gas Co.* v. *City of Toronto* (1897), 27 S.C.R. 453, and *City of Toronto* v. *Consumers Gas Co.* (1914), 19 D.L.R. 882, it has been held that the soil beneath the surface which is occupied under statutory authority by the pipes of a gas company is land of the company, so it must be held that that which is occupied above the surface by the superstructure of the bridge, as well as that which is occupied by the piers, is land of the appellant railway company.

It may be that this land, not including the bridge upon it, is assessable under clause (*a*) of sub-sec. 2 as part of the roadway or right of way, but that is not the way in which it has been assessed; and, if assessable, there are no data for determining at what sum it should be assessed.

The contest throughout has been confined to the single question whether or not the bridge itself is liable to assessment; and as, in my opinion, it is not, the appeal should be allowed and the assessment roll should be amended by striking out the assessment in respect of it.

This conclusion having been come to, it is unnecessary to determine the other question raised by the appellants.

*Appeal allowed.*

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## BARNSWELL v. NATIONAL AMUSEMENT CO.



*British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher and McPhillips, JJ.A. June 7, 1915.*

1. AMUSEMENTS (§ I—1)—RIGHTS OF SPECTATORS—SCOPE OF LICENSE—FORCIBLE EJECTMENT.

One entering upon amusement premises under a paid license enjoys a contractual privilege to remain there undisturbed during the performance, and if forcibly ejected, he is entitled to recover against the owners for breach of contract and for the assault committed upon him.

[*Wood* v. *Ledbitter* (1845), 13 M. & W. 838, distinguished; *Hurst* v. *Picture Theatre Ltd.*, [1915] 1 K.B. 1, followed.]

APPEAL from judgment for plaintiff in action for damages. Statement

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*F. J. McDougall*, for appellant, defendant.

*O'Brian*, for respondent, plaintiff.

MACDONALD, C.J.A.:—I would dismiss the appeal.

IRVING, J.A.:—It appears that the plaintiff had entered the building as a spectator who had duly paid his money to see the entertainment. He was therefore entitled to remain.

Irving, J.A.

*Wood* v. *Ledbitter* (1845), 13 M. & W. 838, 14 L.J. Ex. 161, was decided on the ground that the plaintiff had not obtained an instrument under seal granting him the privilege he claimed. But the Judicature Act has changed all that. The Court now gives effect to equitable considerations, and will protect a right in equity which but for the absence of an instrument under seal would be a right at law: *Hurst* v. *Picture Theatres Ltd.*, [1915] 1 K.B. 1, 83 L.J.K.B. 1837. The damages are not excessive.

I would dismiss the appeal.

Martin, J.A.

MARTIN, J.A.:—This case cannot be distinguished on the facts from the decision in *Hurst* v. *Picture Theatres*, [1915] 1 K.B. 1. The Judge found, rightly, that the plaintiff had purchased his ticket, and the evidence shews clearly that the plaintiff had entered the building, the constable, Barnes, (p. 17) testifying that he went up the steps and got "through the first door, and tried to get through the second door, which was a few feet away . . . into the theatre," meaning the auditorium. So here we have the exercise of a license—his "right to go upon the premises . . . something granted to him for the purpose of enabling him to have that which had been granted him, namely, the right to see," as Lord Justice Buckley puts it at p. 7.

As regards damages, the amount awarded, $50, would not justify our interference, because while suit for breach of contract would be inapplicable, yet the learned Judge has obviously considered that the plaintiff was entitled to something appreciable for the assault.

The appeal therefore should be dismissed.

Galliher, J.A.

GALLIHER, J.A.:—I would dismiss the appeal.

McPhillips, J.A. (dissenting)

MCPHILLIPS, J.A. (dissenting):—I would allow this appeal. This case may be differentiated from that of *Hurst* v. *Picture Theatres Ltd.*, [1915] 1 K.B. 1. The learned trial Judge has found in the present case that "the plaintiff did not get inside the theatre." In the *Hurst* case the plaintiff in that action had occupied his seat for some time. I do not consider that the effect

of the *Hurst* case is to over-rule *Wood* v. *Ledbitter* (1845), 13 M. & W. 838. When this case was referred to by the Right Honourable Sir Frederick Pollock, in the preface to vol. LXVII., he said:—

> *Wood* v. *Ledbitter*, p. 838, is still in principle a decision of first rate authority on the nature of a license as distinguished from a grant, though modern judges may be readier than their predecessors to find a grant or demise in transactions of ambiguous form.

It is true since the decision of the Court of Appeal in the *Hurst* case the Right Hon. Sir Frederick Pollock, in vol. XXXI., No. 121, of the Law Quarterly Review, at p. 9, further deals with *Wood* v. *Ledbitter*, and the case is referred to under the heading "Contents" as follows: "The Passing of *Wood* v. *Ledbitter*." With all deference to the learned editor of the Law Quarterly Review, I very much doubt if the Court of Appeal really intended to go the length of holding that *Wood* v. *Ledbitter* is no longer in principle good law, and in the absence of the determination of the House of Lords or their Lordships of the Privy Council (whose decision, of course, would be binding upon this Court) that *Wood* v. *Ledbitter* is not still good law, I propose, with the greatest of respect for the eminent and distinguished Judges who constituted the majority of the Court of Appeal in the *Hurst* case, to still consider it good law. And it is in the public interest and in the interest of society that there should be law which will admit of the management of places of public entertainment having complete control over those who are to be permitted to attend all such entertainments. I entirely agree with Lord Justice Phillimore in his dissenting judgment in the *Hurst* case. In addition to the cases referred to by Lord Justice Phillimore, I would refer to the following cases decided since the Judicature Acts and *Wood* v. *Ledbitter*, referred to: *Wells* v. *Kingston-upon-Hull Corporation* (1875), L.R. 10 C.P. 402, 409, 44 L.J.C.P. 257; *Butler* v. *Manchester, Sheffield and Lincolnshire R. Co.* (1888), 21 Q.B.D. 207, 211, 57 L.J.Q.B. 564. With respect to *Jones* v. *Tankerville (Earl)*, [1909] 2 Ch. 440, 78 L.J.Ch. 674, in my opinion Parker, J. (now Lord Parker), did not in any way indicate that it was his view that *Wood* v. *Ledbitter* was no longer good law; on the contrary, quite the reverse. What did he say? At p. 676 we find him saying:—

> But it seems clear that, unless the agreement conferred an irrevocable license, the plaintiff was entitled to succeed both in trespass and trover though the defendant might have had a counter claim for damages for breach of contract and if the license were irrevocable it could on the prin-

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ciples laid down in *Wood* v. *Ledbitter* only have been because the contract conferred on the defendant an interest at law in the timber comprised in it.

In the present case there is no interest in property or land. It is not even established that the plaintiff was entitled to any particular seat, nor was he seated or in possession of a seat as in the *Hurst* case. I would also refer at this point to what Lord Justice Phillimore said at p. 643 in the *Hurst* case:—

> This case was distinguishable from *Walsh* v. *Londsale* (21 Ch. D. 9) which was relied on by the plaintiff because there was here no interest in land.

It is to be remarked that the action in the *Hurst* case was one for assault and false imprisonment, not for breach of contract, although apparently the learned trial Judge, Channell, J., submitted both questions to the jury, *i.e.*, breach of contract and assault; the verdict, though, was in respect of the assault only. Unquestionably the assault was proved in the *Hurst* case. In the present case no assault was proved. The learned trial Judge states in his judgment that the plaintiff called for the policeman, and the learned trial Judge would appear to have proceeded solely in his judgment upon breach of contract. Now, should it be that I am wrong in my view of the law that *Wood* v. *Ledbitter* is a decisive authority against the plaintiff, then it is apparent that the damages as and for breach of contract upon the facts of the present case are excessive. At most the damages could only be nominal. In the *Hurst* case, at p. 99 in 30 T.L.R., being the report of the trial, the following is stated:—

> His Lordship (Channell, J.) asked the jury to find whether the plaintiff did or did not pay for his seat. If the jury thought that he did they were to give him damages for the breach of the contract for some such sum as sixpence and the damages for the assault if there was one, must be reasonable, but such a sum as would shew their opinion of what had occurred.

The jury returned a verdict for the plaintiff, and assessed the damages at £150, and intimated that if they had to find a verdict on the contract "they would find a verdict for sixpence." It would follow that if *Wood* v. *Ledbitter* is no longer good law, the plaintiff is not entitled to have judgment for $50 as damages for breach of contract. Adopting the language of Channell, J., in part, the learned trial Judge was only entitled to "give him damages for the breach of the contract for some such sum as" 10 cents—being the price of the ticket, or at most say $5, being

nominal damages, as really no damages were proved to have been sustained. However, being of the opinion that the principles as laid down in *Wood* v. *Ledbitter* are still good law upon the special facts of this case, I feel constrained to come to the conclusion that the appeal should be allowed.

*Appeal dismissed.*

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## BAIN v. COCHANA.

SASK.

S. C.

*Saskatchewan Supreme Court, Newlands, Elwood, and McKay, JJ. March 20, 1915.*

1. MASTER AND SERVANT (§ I C—10)—TIME OF HIRING—PER DIEM CHARGE NAMED—BASIS OF COMPENSATION—AGREEMENT.

Where at the time of the hiring the person hired told the employer what the per diem charge would be for the service, that should be the basis of compensation as constituting an agreement to pay that amount and not merely a *quantum meruit*, where the service was accepted and no variation of such compensation was discussed.

APPEAL from a District Court Judge.

Statement

The judgment of the Court was delivered by

ELWOOD, J.:—This is an action brought by the plaintiff to recover from the defendant money for nursing the wife of the defendant. The learned District Court Judge came to the conclusion apparently that there was no bargain between the parties as to the amount of compensation to be paid, and allowed the plaintiff what in his opinion from the evidence was a fair compensation. The plaintiff in her evidence swears that at the time of the hiring she told the defendant that her charge would be $3 a day. A witness named New, called on behalf of the plaintiff, swore that before the hiring the defendant asked him about getting a nurse, and he recommended the plaintiff and said that her charge would be $3 a day, and the defendant agreed to this. The defendant in his evidence admitted having had a conversation with New, but denied that there had been any conversation with him about the compensation to be paid. The defendant did not, however, deny the evidence of the plaintiff as to her having had a conversation with the defendant as to what her remuneration should be. That being so, the uncontradicted evidence is that at the time of the hiring the plaintiff and the de-

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fendant did have a conversation, in which the plaintiff told the defendant what she would charge. The defendant thereupon hired her, and, in my opinion, that constituted a hiring at $3 a day. The evidence is a little uncertain as to the exact length of time that the plaintiff was engaged with Mrs. Cochana, but she says she was with her 6 days, and afterwards 10 weeks at the hospital, which makes a total of 76 days. I am therefore of opinion that she is entitled to be paid for the 76 days at $3 a day, which would make a total of $228 for which she should have judgment, and she should also have her costs of the action and of this appeal.

*Order accordingly.*

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MAN.

C. A.

## SPENCER v. FARTHING.

*Manitoba Court of Appeal, Howell, C.J.M., Richards, Cameron, and Haggart, JJ.A. July 23, 1915.*

1. OFFICERS (§ I A 2—10)—MUNICIPAL COUNCILLORS—CANDIDATES — PROPERTY QUALIFICATIONS.

The value of the property qualification of a candidate for municipal councillor required by sec. 52 of the Municipal Act (Man.) was held by a divided court to mean the actual, not the assessed value at the time of the election.

Statement

APPEAL from a judgment dismissing a petition to set aside an election.

*C. H. Locke*, and *H. P. Reed*, for appellant, petitioner.

*H. V. Hudson*, for respondent.

Howell, C.J.M.

HOWELL, C.J.M., concurred with CAMERON, J.A.

Richards, J.A.

RICHARDS, J.A.:—The plaintiff took proceedings to set aside the election of the defendant as councillor for a rural municipality on the ground that his property qualification was insufficient.

Under sec. 52 of the Municipal Act a candidate for councillor must be the owner

at the time of election, of freehold real estate within the municipality rated in his own name on the last revised assessment roll of the municipality of at least the value of $100 over and above all charges, liens and encumbrances affecting the same.

The learned trial Judge took evidence and was satisfied that the actual value of the defendant's real estate, in respect of which he was assessed, was considerably more than $100 over and above

the amount of the encumbrances against the same, and he dismissed the plaintiff's petition, holding that the word "value" meant the actual value and not the amount at which the property was assessed.

The plaintiff has appealed to this Court, claiming that the word "value," as mentioned in the above, refers to the value at which the property is assessed, and it is admitted that, if that contention is correct, the amount at which the property was actually assessed was not as much as the encumbrances against the property.

In the Revised Statutes of 1892, ch. 100, sec. 51 (*b*), candidates were, as to property, required only to be the owners

> respectively at the time of election of real estate within the municipality rated in their own names respectively on the last revised assessment roll of the municipality.

By the Municipal Assessment Act in the same revision of the statutes, ch. 101, sec. 24,

> all lands in rural municipalties improved for farming or gardening purposes shall be assessed at the same value as such lands would be assessed if unimproved. With an addition, which is immaterial for present purposes, the last above quoted provision has continued to be, and still is, the law.

In 1897, by ch. 20, sec. 2, the above quoted provision as to qualification was amended by adding thereto the words "of at least the value of one hundred dollars over and above all charges, liens and encumbrances affecting the same."

In Revised Statutes of Manitoba, 1892, ch. 100, sec. 51 (*a*), the provision as to qualification in cities, towns and villages says that the parties must be

> rated in their own names respectively on the last revised assessment roll of the municipality to at least the value following, over and above all charges, liens and encumbrances affecting the same.

It will be noted that the word "to" is used in the last quotation where in sub-sec. (*b*) as amended by the Act of 1897, the word "of" is used. In all subsequent Acts this distinction has been maintained, and in the Act in force to-day it still exists.

In the Revised Statutes of 1902, in stating the qualification in rural municipalities, a comma is inserted between the words "last revised assessment roll of the municipality" and the words added in 1897. That comma has since been omitted, and, for

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that reason, I do not place much reliance upon it, though it is a matter that may possibly be considered.

It seems to me that in the continued use of the word "of" in the qualification for rural municipalities, while the word "to" is equally continued in describing the qualifications for other municipalities, there has probably been a definite object.

I think that the explanation may be found in the provision as to lands being assessed in rural municipalities at the same value as they would be if unimproved. If the plaintiff's contention is correct, then a farmer with land that would be worth $2,000 in its unimproved condition, who has improved it with buildings and cultivation until it is worth $6,000 or $8,000, is disqualified if he has encumbrances of $2,000 against it, while the owner of an unimproved adjoining piece, worth, say, $2,200 only, but with $2,000 of encumbrances against it, would be qualified.

In the case of property improved as a market garden to perhaps ten or twenty times its unimproved value the contention of the plaintiff, if given effect to, would be still more unjust.

I am of the opinion that the intention of the legislature in the Act of 1897 and subsequent Acts was to confer the qualification as to councillors in rural municipalities wherever the actual value exceeded, by at least $100, the encumbrances.

I would dismiss the appeal.

Cameron, J.A.

CAMERON, J.A.:—This is a petition by the unsuccessful candidate for councillor for ward 2 of the Rural Municipality of Russell, at the annual election held December 14, 1914, when he and the respondent J. H. Farthing were candidates and the latter was declared elected. The petition asks that it be declared that the said Farthing was not duly elected and that the election was void. The property qualification of the successful candidate is called in question and the case depends on the construction to be given to sub-sec. (*c*) of sec. 52 of the Municipal Act, ch. 133, R.S.M.

The facts are set forth in the judgment of the learned County Court Judge who held that sub-section had been complied with and dismissed the petition. He held it was sufficient if it appeared that the candidate was the owner of real estate within the municipality of at least the value of $100 and be also rated in his own name on the last revised assessment roll. He considered

this reading of the sub-section preferable to that which would require the candidate to be the owner of real estate within the municipality, assessed in his own name, of at least the value of $100 according to such assessment. The latter construction, he points out, might lead to many absurd conclusions. No doubt that is correct. But the assessment of lands in rural municipalities is placed by statute on an arbitrary basis which is of itself bound to involve awkward conclusions. So also the qualification fixed by sub-section (*c*) is arbitrary, and, even when read as the learned County Court Judge reads it, may possibly lead to strange results. The very necessity of requiring the candidate to be rated at all might, in circumstances readily conceivable, do so. To my mind the sub-section fixes a definite, and, therefore, necessarily arbitrary standard of qualification and that is the ownership by the candidate of freehold real estate within the municipality which must be rated in his name on the last revised assessment roll as at least of the value of $100 over and above all charges, liens and encumbrances. This construction is uniform with that which must obviously be given to sub-secs. (*a*) and (*b*). I confess I cannot attach importance to the use of the word "of" after "municipality" in sub-sec. (*c*) instead of the word "to" found in the preceding sub-sections. The reading given by the County Court Judge to sub-sec. (*c*) separates the rating from the value of the property which is the basis of qualification. With deference, I must say that, in my opinion, the wording of the sub-section does not separate but joins the two and requires that the rating of the real estate on the assessment roll shall be, not only in the name of the candidate, but of the value of $100 over and above encumbrances.

I think the appeal must be allowed.

HAGGART, J.A.:—The reading we give to sec. 52 and its sub-secs. (*a*), (*b*) and (*c*), of ch. 133, R.S.M., the Municipal Act, will determine the qualification of J. H. Farthing, one of the candidates at the municipal election for the Rural Municipality of Russell held last December. Haggart, J.A.

The wording of sec. 52 is as follows:—

52. The persons eligible for election as mayors, aldermen, reeves and councillors shall be natural born or naturalized subjects of His Majesty and males of the full age of twenty-one years, able to read and write, not subject to any disqualification under this Act, and qualified as follows:—

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(*a*) In cities and towns: In the case of the mayor, being resident in the municipality, in the case of an alderman (or councillor) being resident in the ward for which he may be a candidate for election, and, in each case, the owner, at the time of election, of freehold real estate, rated in his own name, on the last revised assessment roll of the municipality to at least the value of five hundred dollars over and above all charges, liens and encumbrances affecting the same;

(*b*) In villages: In case of the mayor, being resident in the municipality, in the case of a councillor, being resident in the ward for which he may be a candidate for election, and, in each case, the owner, at the time of election, of freehold real estate, rated in his own name on the last revised assessment roll of the municipality to at least the value of three hundred dollars over and above all charges, liens and encumbrances affecting the same;

(*c*) In rural municipalities: In the case of the reeve, being resident in the municipality, or, if not so resident, having expressed in writing to the returning officer, on or before the nomination day, willingness to accept office if elected; in the case of a councillor, being resident in the ward in which he may be a candidate for election, and, in each case, being the owner, at the time of election, of freehold real estate within the municipality, rated in his own name on the last revised assessment roll of the municipality of at least the value of one hundred dollars over and above all charges, liens and encumbrances affecting the same.

Sub-secs. (*a*) and (*b*) provide for the qualification of candidates in cities, towns and villages, and sub-sec. (*c*) the qualification of candidates in rural municipalities.

The Municipal Assessment Act, ch. 134, sec. 29, provides that "In cities, towns and villages all real and personal property may be assessed at less than actual value, or in some uniform and equitable proportion of actual value, so that the rate of taxation shall fall equally upon the same. The expression 'actual value' used in this section shall mean the fair market value of such property, regardless of a prospective increase or decrease, either probable, remote or near." And sec. 28 of the same Act provides that "All lands in rural municipalities, improved for farming, stock raising or gardening purposes, shall be assessed at the same value as such land would be assessed if unimproved."

It was urged that the changing of the wording "of at least" in sub-secs. (*a*) and (*b*) to "to at least" in sub-sec. (*c*) must have been the result of a slip or a printer's error, and further, that, in any event, the meaning was substantially the same in all the sub-sections. I think the change was designedly made and for a good purpose. In cities, towns and villages improvements

as well as the land are assessed, but in rural municipalities improvements are exempted. I can understand that the buildings on an up-to-date farm and the plant on an up-to-date market garden might far exceed the value of the actual land, so that I have no doubt the legislature had in view such cases as the one we are considering, and in this way they intended to prevent the disqualification of such men as Mr. Farthing.

Farthing was a resident of the ward in which he was a candidate; was the owner of freehold real estate within the municipality; was rated on the last revised assessment roll; and the property in respect of which he was rated was "of at least the value of $100 over and above all charges, liens and incumbrances affecting the same." These were the qualifications required by a candidate for councillor.

I would give sub-sec. (*c*) the interpretation given to it by the trial Judge. I would affirm his judgment and dismiss the appeal.

*Appeal dismissed—Court divided.*

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## DESAUTELS v. McCLELLAN.



*Alberta Supreme Court, Beck, J. February* 11, 1915.

1. LOGS AND LOGGING (§ I—10)—WAGES—WOODMAN'S LIEN.

The contractor for logging operations is entitled as well as the wage earner to a lien on the logs or lumber in respect of the work he has had performed in cutting the timber and hauling the logs to the mill for the agreed contract price by virtue of the Woodman's Lien Act, Alta., 1913, 2nd sess., ch. 28.

[*Baxter* v. *Kennedy*, 35 N.B.R. 179, distinguished.]

ACTION under the Woodman's Lien Act, Alberta. Statement

*E. B. Edwards*, K.C., for plaintiff.

*B. Pratt*, for defendants.

BECK, J.:—I have to decide whether a "contractor" may be entitled to a lien under the Woodman's Lien Act (ch. 28 of 1913, 2nd sess.). The plaintiff agreed Beck, J.

to enter immediately on to timber berth 1296. Block one and log on section 34 and place in close proximity to haul to the mill or mills 2 million feet of logs to be delivered before October 1, 1914, and in sufficient quantity to keep the mills running.

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The defendant agreed to pay "$5 per thousand feet for the logs."

Payment was to be made as follows: "80 per cent. of the full value . . . on the delivery of each quarter million feet."

Sec. 3 of the Act says:—

Any person performing any *labour, service* or *services* in connection with any logs or timber within this province shall have a lien thereon . . . for such labour, service or services.

Sec. 2, clause (*c*), says that:—

The expression "person" in the 3rd section shall be interpreted to *include* clerks, timekeepers, storekeepers, cooks, blacksmiths, artisans and all others usually employed in connection with such labour, service or services.

This clause is obviously not a definition but merely a clause declaring that certain classes of persons concerning whom there might be doubt as to whether they come within the meaning of the word "person" are to be deemed so.

Sec. 2, clause (*b*), reads:—

The expression "labour, service or services" *means* and *includes* cutting, skidding, felling, hauling, scaling, banking, driving, running, rafting, or booming any logs or timber, and any work done by cooks, blacksmiths, artisans, and others usually employed in connection therewith whether performed by wage-earners or others.

The word "wage-earner" appears nowhere else in the Act, nor does the word "wages," nor are there elsewhere any expressions in any part of the Act which throw any light upon the question I have to determine.

One would expect the same collocation of words descriptive of persons in the latter part of clause (*b*) as appears in clause (*c*).

The words occurring in each, "others usually employed in connection with such labour, service or services" or "therewith," I think, make the classes of persons included identical; and the words "whether performed by wage-earners or others" shew that with respect to the classes of persons listed it is immaterial whether their remuneration is by way of wages or otherwise, *i.e.*, I should say, *e.g.*, by the piece, by way of salary, commission or profit-sharing.

It seems clear then that the idea of the Act being for the benefit of wage-earners only is excluded. So also is the idea of

its being for the benefit of those only coming without the ordinary meaning of the word labourer.

Then we have to apply these interpretative clauses to the section which imposes the lien.

Then I think its meaning is accurately expressed as follows: "Any person"—"cutting, skidding, felling, hauling, scaling, banking, driving, running, rafting or booming any logs or timber"—"shall have a lien thereon."

"Person" in this section shall *include* "clerks, timekeepers, storekeepers, cooks, blacksmiths, artisans and others usually employed in connection with such cutting, skidding, etc., whether they are to be paid by way of wages or not."

It seems to me that so read, the section gives a lien to the person who contracted with the owner to cut, skid, etc., and who if he enters upon the performance of his contract does in fact in the very terms of the Act, cut, skid, etc., and that the purpose of the inclusive clause is to include a class of persons who in fact do not cut, skid, etc., but do work in connection therewith without whose services, the work could not be carried on.

There seems to be only one Canadian authority which is of any assistance, *Baxter* v. *Kennedy*, 35 N.B.R. 179. That case held, one Judge dissenting, that the New Brunswick Act was limited to wage earners but the Act is very different and much stress was laid upon the use in it of such words as wages.

It is admitted that a considerable sum is owing to the plaintiff under his contract. I shall therefore hold that the plaintiff is entitled to a lien under the Act.

There are some subsidiary questions as to the amount owing to him and the remedies to be given him pending the final determination of the action. These and any other questions can be spoken to.

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## NEWBERRY v. BROWN.

B. C.
C. A.

*British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher, and McPhillips, JJ.A. August 10, 1915.*

1. CONTRACTS (§ I E 5—105)—STATUTE OF FRAUDS—DESCRIPTION OF PARTIES—DEFINITENESS.

The description of a contracting party as the "client of etc.," without specifying the name and with no independent writings to establish the identity, is defective for want of definiteness under the Statute of Frauds, and the contract operates only as an offer on the party to be charged.

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2. EVIDENCE (§ VI J—572)—EXTRINSIC EVIDENCE — ADMISSIBILITY — DESCRIPTION OF PARTIES.

A true description of the contracting parties may be established by the admission of extrinsic evidence.

Statement

APPEAL from judgment for defendant, 20 D.L.R. 896, in action on contract unenforceable under Statute of Frauds.

*Ritchie*, K.C., for appellant.

*S. S. Taylor*, K.C., for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I agree with Mr. Justice Irving in dismissing the appeal.

Irving, J.A.

IRVING, J.A.:—To satisfy the Statute of Frauds in respect of a description of the property, there must be such a description as will, having regard to the circumstances of the case shew clearly what is intended to be dealt with—that is the case of *Plant* v. *Bourne*, [1897] 2 Ch. 281, a case on the admission of extrinsic evidence, and was decided on the authority of Sir William Grant in *Ogilvie* v. *Foljambe* (1817), 3 Mer. 53, where the property was described as "Mr. Ogilvie's House."

In respect of a description of the contracting parties there exists the same rule for the admission of extrinsic evidence, but as there is more room for error in the description of a number of persons, or a class of persons, the rule is that the description must be such that there can be no reasonable doubt as to who the parties are, or "such that their identity cannot be fairly disputed." In *Carr* v. *Lynch*, [1900] 1 Ch. 613, the identity of the purchase was fixed by the fact that the offer was made to the person who paid the £50. In *Calori* v. *Andrews* (1906), 12 B.C.R. 236, affirmed, 38 Can. S.C.R. 588, the identity of the purchaser was fixed by the correspondence. But in this case the offer was to a "client of P. N. Anderson." Mr. Ritchie would add the words "who owns the Cadillac Hotel." But why not read it to any "client?" The words actually used would include the owner of the equity of redemption, the holder of the option or any of the mortgagees. I would dismiss the appeal.

Martin, J.A.

MARTIN, J.A.:—This appeal should, I think, be dismissed for the reasons given by the learned trial Judge. It was urged upon us that the word "exchange" imports more of ownership than "sell," and that special significance should be attached to it, but I find myself unable to take that view. We are invited

here to enter the realm of speculation as to who the so-called "client" was (and he might have been one of several persons), the very thing the statute was intended to prevent.

GALLIHER, J.A.:—I agree with the learned trial Judge and would dismiss the appeal.

McPHILLIPS, J.A.:—After very careful consideration of the arguments presented from both sides upon this appeal and consideration of the numerous authorities cited, I remain of the opinion I formed at the hearing of the appeal and that is that the learned trial Judge arrived at the right conclusion. It is difficult at times upon the particular facts of each case to rightly determine whether the plea of the Statute of Frauds is established. In the present case the writing as signed by the defendant cannot be said to be more than an offer, it does not shew to whom the offer is made, that is to say, the purchaser, and the defendant is not shewn to have signed any other writing which makes up for the deficiency apparent in the writing—"Client of P. N. Anderson" would not appear upon the authorities to be sufficiently definite (*Rossiter* v. *Miller* (1878), 3 App. Cas. 1124). It is true that upon the facts as proved independent of the writing, that the defendant knew with whom the transaction was being carried out and Anderson who was to some extent the agent of the defendant, well knew who that person was, and it was undoubtedly the plaintiff, bearing in mind these facts, *Andrews* v. *Calori* (1907), 38 Can. S.C.R. 588, gave me most anxious consideration, especially the language of Maclennan, J., at p. 597, where he said:—

That person however had signed nothing, and even his name was not known to him. But his identity and name were not uncertain. Both were known to Clark.

However, the facts were more complete in the case and the person buying had paid a deposit, and that fact could be established with certainty—nevertheless this decision of the Supreme Court of Canada would appear to have proceeded with the greatest respect to the Supreme Court of Canada—a very long way and gives rise to difficulties of reconciling the long line of decisions bearing upon this very much debated Statute of Frauds, and somewhat analogous to *Warner* v. *Willington*

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(1856), 3 Drew. 523, referred to in Fry at p. 282 (Specific Performance, 5th ed., with Canadian notes, 1911) where in referring to *Warner* v. *Widlington*, *supra*, this is said:—

It is submitted that this decision is not without difficulties on principle.

Also see *Goodman* v. *Griffiths* (1857), 1 H. & N. 574; *Wood* v. *Midgley* (1854), 5 DeG. M. & G. 41, 46. It is therefore with some hesitancy in view of the decision in *Andrews* v. *Calori*, *supra*, that I have arrived at my conclusion that the plaintiff cannot succeed in the action. The defence wholly proceeded upon the Statute of Frauds—independent of the statute—there was unquestionably an offer made by the defendant to the plaintiff, accepted by the plaintiff, and that acceptance duly communicated to the defendant. There would not appear upon the facts of the present case, that which is requisite to comply with the legal maxim, *id certum est quod certum reddi potest*: see *Williams* v. *Jordan* (1877), 6 Ch.D. 517; *Rossiter* v. *Miller*, *supra*, at pp. 1124, 1140; *Hood* v. *Lord Barrington* (1868), L.R. 6 Eq. 218; *Bourdillon* v. *Collins* (1871), 19 W.R. 556; *Carr* v. *Lynch*, [1900] 1 Ch. 613; *Craig* v. *Elliott* (1885), 15 L.R. Ir. 257.

In the language of Lord Justice Turner in *Skelton* v. *Cole* (1857), 1 DeG. & J. 587-597 (118 R.R. 241). "On the Statute of Frauds, therefore, the plaintiff's case fails." The appeal should, in my opinion, be dismissed. *Appeal dismissed.*

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## HETHERINGTON v. SINCLAIR.

*Ontario Supreme Court, Middleton, J. April 30, 1915*

1. MORTGAGE (§ I B—8) — CONVEYANCE ABSOLUTE IN FORM — POWER OF SALE.

A conveyance of land by a deed absolute in form, but which had been intended as security for a debt, does not import a power of sale by which the grantee may sell the property without the concurrence of the grantor.

[*Pearson* v. *Benson*, 28 Beav. 598, followed; *Oland* v. *McNeil*, 32 Can. S.C.R. 23, distinguished.]

2. VENDOR AND PURCHASER (§ III—35)—SALE OF LAND CONVEYED AS SECURITY—BONA FIDE PURCHASER—PRIORITIES.

One claiming land under an unregistered contract of sale, on which the balance of the purchase money had not been paid, is not a *bonâ fide* purchaser for value so as to be entitled to a conveyance of the land in priority to a right of redemption in one who had conveyed the land to the vendor by a deed absolute in form but intended as security for a debt.

[*Molony* v. *Kernan*, 2 Dr. & War. 31, followed.]

3. DAMAGES (§ III A 3—62)—BREACH OF CONTRACT TO CONVEY—LOSS OF PROFITS—MEASURE OF DAMAGES.

The inability of a vendor to perform a contract for the sale of land because of the objections by one who conveyed the land as security for a debt entitles the purchaser to a refund of the money paid thereon, but not to any loss of profit by reason of the increase of value since the purchase.

[*McNiven* v. *Pigott*, 22 D.L.R. 141, 147, 33 O.L.R. 78, 335, referred to.]

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S. C.

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ACTION for an account and redemption and to set aside an agreement for the sale of land. Statement.

*J. G. Kerr*, for the plaintiff.

*R. L. Brackin*, for the defendants Perkins and Toll.

*O. L. Lewis*, K.C., for the defendant Sinclair.

MIDDLETON, J.:—By deed bearing date the 3rd January, 1894, Mary Jane Craford and Philander Craford conveyed certain lands to the defendant Sinclair, by a deed which, though absolute in form, is, it is admitted, intended to be in truth a mortgage or security for debt. Middleton, J.

Part of the land covered by this deed was sold, and some controversy arose between the Crafords and Sinclair. This was submitted to arbitration. The submission is not produced, but an award was made dated the 15th October, 1901. By this award it is found that this conveyance was in reality a trust deed held as security for payment of money due by the grantors. An account is then taken between the parties, in which a balance is found due to Sinclair, and the lands then remaining unsold, as well as certain other securities, are directed "to be held by the said Sinclair as security for a repayment to him of the said amount due him, and interest thereon at 6 per cent., and that all sums received by him . . . on sales of the said lands or any part thereof shall be applied by him upon the amount found due to him as aforesaid."

After the date of this award, sales were made, in each case with the authority and approval of the Crafords. Where their interest in the property was known, they joined in the conveyance. Where the purchaser only knew of Sinclair's apparently absolute title, Sinclair alone conveyed.

In all these transactions the husband was the active party, although the wife was really the owner of the land. Both hus-

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band and wife are now dead, and the wife, by her will, left everything to the plaintiff, her daughter.

Sinclair is, I think, an entirely honest and well-meaning man, and had no intention of in any way defrauding the plaintiff; but, upon the death of Craford and his wife, he assumed to deal with the property without in any way consulting the plaintiff.

A drainage scheme of a most extensive character was suggested, by which the lands in question and a large amount of other lands near the Rond Eau were to be reclaimed. Sinclair was apparently inexperienced in farming upon reclaimed lands, his own place being upon high land, and the suggested scheme appeared to him one problematical of success. He was also apprehensive of the great cost involved, the assessment being $22.50 per acre, in addition to a small annual charge for pumping.

The defendants Perkins and Toll are enterprising young men, who saw the opportunity to which Sinclair was blind. They asked Sinclair his price for the land, and he told them $10 per acre; and they agreed to buy at that price, paying $100 down and agreeing to pay $100 a year, with interest at 7 per cent., until the land was paid for. The total acreage, according to the plan prepared in connection with the drainage scheme, is 62 acres, so that the price, assuming the measurement to be accurate, would be $620. The lands were really worth much more than this—probably $50 per acre, with the possibility of being worth several times this figure if the drainage scheme is a success (this price being given upon the assumption that the purchaser assumed the whole drainage tax). The purchase by these defendants was *bonâ fide*, although at a great undervalue. The agreement for purchase was not registered, so that the defendants cannot claim the protection of the Registry Act.

The plaintiff contends that Sinclair had no right to make this sale without her concurrence; and in this, I think, she is right. It is laid down in Fisher on Mortgages, 6th ed., p. 193, that where a deed, absolute in form, is taken as security for a debt, the grantee has no power of sale, unless indeed a statutory power of sale can be imported into the deed; nor can the

mortgagee foreclose; he holds the land as trustee, and his only remedy, in the absence of the concurrence of the mortgagor, is to have a sale through the Court.

The decision in *Pearson* v. *Benson* (1860), 28 Beav. 598, is cited in support of this proposition. There Sir John Romilly, finding that an absolute deed was in truth a security, had to deal with the title of a purchaser from the grantee. It was argued that, the transaction being treated as a mortgage, the clauses usually contained in a mortgage-deed must be treated as contained in it, and that therefore there would be a power of sale which would support the title of the purchaser. The learned Judge repudiates this: "I, however, wholly dissent from that doctrine, which might altogether defeat the rights of plaintiffs in cases where purchase-deeds are . . . ordered to stand as a mere security for the money advanced; for if you import a power of sale into such a transaction the property might be lost by a sale from the first purchaser to a second. But that is not the doctrine of the Court: on the contrary, it is not in the power of a person who has made the purchase, and has treated the transaction as such, afterwards to act on it as a security for the money due to him, and to import into the transaction a power of sale which does not exist."

This decision was appealed, and was affirmed by the Lords Justices of Appeal, Knight Bruce and Turner, and has never since been questioned. *Oland* v. *McNeil* (1902), 32 S.C.R. 23, is not in conflict with this, for there the deed contained a power of sale, and all that is decided is that this power might be exercised without notice.

The question then remains whether the defendants Perkins and Toll are *bonâ fide* purchasers for value from Sinclair, so as to preclude the plaintiff from asserting her right. I have come to the conclusion that they are not. The contract with them is executory. The land has never been conveyed. Upon payment of the balance of the purchase-money, they will have an equity to compel a conveyance of the property to them, but this equity is subject to the plaintiff's prior equity. Her equity to have the land reconveyed to her, upon payment to Sinclair of the balance due to him, cannot be thus defeated. Lord St.

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Leonards in *Molony* v. *Kernan* (1842), 2 Dr. & War. 31, has laid down clearly that actual payment of the price is necessary to establish a purchase for value.

The plaintiff, coming to Court seeking to redeem, must be prepared to do equity. She must—and her counsel said she was ready—pay off the balance due to Sinclair. The purchasers are entitled to be refunded the money paid to Sinclair. In this action an accounting is sought, and it was agreed that I should refer the action to the Master to take the account of the amount remaining due to Sinclair.

It is not easy to deal equitably with the question of costs. In the reference, in the absence of misconduct, Sinclair, as mortgagee, would be entitled to be allowed the costs of accounting; but the litigation has been occasioned by Sinclair and his co-defendants setting up absolute title to the lands and the right to convey. I think a fair disposition would be to direct Sinclair on the one hand, and Perkins and Toll on the other, each to bear one-half of the costs of the action down to and including the trial; the costs payable by Perkins and Toll to be set off *pro tanto* against the $100 which they have paid under the contract. In the accounting between the plaintiff and Sinclair, Sinclair must then give credit for this $100 and for the half of the costs for which he is liable. In default of payment of the amount found due to Sinclair, within a time to be fixed by the Master, the lands must be resold by the ordinary procedure of the Master's office. The costs of the reference will be reserved to the Master, but they will be given to Sinclair as mortgagee unless he is found by the Master to have been guilty of improper conduct.

Perkins and Toll have served a third party notice, and I understand that this has been directed to be tried at this hearing. They claim as against Sinclair to recover the loss of profit which they would have made by reason of the increase in value of the lands since the purchase, and upon the ground that he had covenanted to convey.

For the reasons given in the recent decision of *McNiven* v. *Pigott* (1914-5), 22 D.L.R. 141, 147, I do not think that these

damages can be recovered. No evidence was given shewing that any other damage had been sustained.

The proper disposition of the third party proceedings is, I think, to make no order, and to leave each party to bear his own costs. *Judgment accordingly.*

ONT.

HETHERINGTON v. SINCLAIR.

Middleton, J.

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## VILLAGE OF PIERREVILLE v. BELL TELEPHONE CO.

QUE.

C. C.

*Quebec Circuit Court, County of Yamaska, Bruneau, J. September 10, 1915.*

1. MUNICIPAL CORPORATIONS (§ II H—279)—TAXES—TELEPHONE POLES AND WIRES—ILLEGALITY OF.

The municipal tax imposed by a village municipality on the telephone poles and wires situate in the streets of the village is illegal and cannot be recovered.

ACTION for the recovery of taxes.

Statement

*Cardin & Allard*, for plaintiff.

*F. Lefebre*, for defendant.

BRUNEAU, J.:—Action for the recovery of $14.42 for municipal taxes for the years 1913 and 1914, levied on property owned by the defendant in the municipality of the village of Pierreville. It is admitted by the parties that this property valued at $1,000 consists in poles and telephone wires of the defendant, situate in the streets of the said village. The defendant pleads that such property is not taxable and that the taxes claimed are in consequence illegal.

Bruneau, J.

The question which has given rise to this litigation is not a new one. Up to the year 1910, the jurisprudence appears to me to have been favourable to the contentions of the plaintiff. Thus, on December 23, 1891, Tait, J., maintained the principle invoked by the plaintiff in the case of *Sherbrooke Gas & Water Co.* v. *City of Sherbrooke* (15 L.N. 22). On October 31, 1899, White, J., decided the same question in the same sense in a case in which the present defendant was plaintiff against the Corporation of the Township of Ascot (16 Que. S.C. 436).

These two judgments were rendered by the Circuit Court on appeal from resolutions of the local council in virtue of art. 1061 of the Municipal Code. DeLorimier, J., has also decided the same question in the same sense as Tait and White, JJ., in the case of the *Montreal Light & Power Company, and the Town of Westmount*, but this judgment was reversed by the Court of

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King's Bench on June 28, 1910 (20 Que. K.B. 244), and the Supreme Court of Canada, the highest Court of our country, confirmed the judgment of the highest Court of our Province (44 Can. S.C.R. 364).

These two judgments have definitely settled the point at issue in this case. I know of no subsequent decision to the contrary. The Superior Court, on the contrary, presided over by Laurendeau, J., adopted on March 8, 1912, the principle of jurisprudence laid down by the Court of Appeal and the Supreme Court, in the case of *School Mun. of Ste. Cunegonde* v. *Montreal Water & Power Co.* (4 D.L.R. 776, 41 Que. S.C. 500).

The defendant cited several other precedents in cases of the same nature as the present, and in which it was also a party. As these judgments are not reported in our Law Reports and as copies of the records were not produced, I have been unable to verify the same, but I have reason to believe, in view of the foregoing, that the defendant has in effect succeeded since 1910 in having the imposition of similar taxes declared illegal.

The recent jurisprudence of the highest Courts of the country leave me no option but to dismiss the plaintiff's action with costs. *Action dismissed.*

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B. C.

C. A.

## SHARP v. INGLES.

*British Columbia Court of Appeal, Macdonald, C.J.A., Irving and McPhillips, JJ.A. August 10, 1915.*

1. SALE (§ III A—57)—WARRANTY OF TITLE—OUTSTANDING MORTGAGE—RIGHT OF PURCHASER TO INDEMNITY.

A purchaser is entitled to be indemnified by the immediate seller where the title to the article sold fails by reason of an outstanding chattel mortgage.

2. CHATTEL MORTGAGE (§ II C—15)—SUBJECT MATTER OF MORTGAGE—INTEREST OF PURCHASER UNDER CONDITIONAL SALE.

The interest of a purchaser under a conditional sale, whereby the title to the goods remains in the seller until the price is fully paid, may form the subject matter of a chattel mortgage.

3. JUDICIAL SALE (§ III—26)—SALE UNDER EXECUTION—COVENANT OF TITLE—LIABILITY OF SHERIFF TO PURCHASER.

Although a sheriff is not required to covenant for good title to a purchaser in a sale under execution, still, where in the absence of fraud or mistake a covenant of such effect and for indemnity to the purchaser is entered into by the sheriff in his bill of sale to the articles sold, he cannot be relieved from liability thereunder where the title of the purchaser failed because of an outstanding mortgage.

Statement

APPEAL from judgment of Grant, County Judge, dismissing action for breach of covenant of title.

*Cecil Killam*, for appellant.
*W. C. Brown*, for respondent.
*Baillie*, for third party.
*Douglas Armour*, for fourth party.

MACDONALD, C.J.A.:—As the transactions referred to in evidence are somewhat involved, I shall briefly state the facts. The French Auto Co., in April, 1912, sold the car in question to one Firth, and took a conditional sale agreement, which was duly registered, and which declared that the property in the car should remain in the seller until the note given for the purchase price—$2,400—should be paid in full.

Firth, by a bill of sale, dated May, 1913, and duly registered, mortgaged the car to one Morton for $1,000.

The car was seized by the sheriff under a *fi. fa.*, at the instance of creditors, in September, 1913, and the French Auto Co. put in a claim to the car under their said conditional sale agreement. The sheriff agreed with the Auto Company that, if the car brought a sum in excess of the company's claim upon it, which was then $405.40, that that sum should be paid over to the company, but if that sum were not realized, he should refrain from selling and should deliver the car to the auto company. The sheriff then proceeded to sell, as he says, under the *fi. fa.*, and realised therefrom the sum of $518, out of which he paid the auto company's claim against the car. The balance was distributed under the provisions of the Creditors Relief Act, the registered mortgage of Morton being ignored, presumably because the records were not searched. The sheriff gave an absolute bill of sale of the car to the purchaser, Gillespie, containing a covenant for good title and of indemnity against failure of title. On the following day Gillespie, by a similar instrument, transferred the car to the defendant, who, in April, 1914, by a similar instrument, transferred it to the plaintiff for the consideration of $1,200. Shortly after the last-mentioned sale, the car was seized by the mortgagee, Morton, and by him given back to the plaintiff upon his giving a bond in the penal sum of $1,200 to secure its return to Morton at the conclusion of contemplated litigation, which was afterwards commenced by the issue of the writ in this action.

The plaintiff sued for $1,200 damages for the breach of the covenant for good title. The defendant brought in Gillespie as

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third party and claimed indemnity against him, and Gillespie, in turn, brought in the sheriff as fourth party, claiming indemnity against him. The learned Judge dismissed the action, and from that judgment the plaintiff has appealed.

In my opinion, Morton's position was that of a second mortgagee, the auto company being, in a sense, first mortgagee. The sheriff was entitled, therefore, to sell under the *fi. fa.* only the interest of Firth in the car. The right of the auto company, under its conditional sale agreement, was "to take possession of the said automobile without process of law and sell the same at public or private (*sic*) auction" to satisfy its claim for balance of purchase money.

The company did not take possession nor did it sell or direct the sale of the car; it simply consented to the sheriff doing so under legal process, agreeing to waive its right to interfere if paid in full out of the proceeds of the sale.

There is nothing to shew that the sheriff was purporting to sell for the first mortgagee, the auto company, or that Morton's interests were being in any way endangered. He took his mortgage with knowledge of the conditional sale agreement, and would be bound by any proper exercise of the auto company's power of sale. That was the risk he took. He had nothing to fear from a sale under a judgment subsequent in date to his mortgage.

Counsel for the sheriff contended that Morton's mortgage could not attach, because of the antecedent charge of the auto company. Judge Barron, in the second edition of his work on Chattel Mortgages and Bills of Sale, at p. 19, says:—

> Both the seller and buyer on a conditional sale of goods have such an interest therein as may be mortgaged.

I cannot, therefore, see any escape from the conclusion that the plaintiff is entitled to succeed and to have judgment for the sum claimed. Defendant is entitled to be indemnified by the third party—Gillespie.

The position of the fourth party, the sheriff, is unfortunate. He has sworn that the covenant for title in the bill of sale to Gillespie was either not noticed by him or not understood when he signed it. No such covenant could be required from him as sheriff, and none such was intended to be given. Still Gillespie swears that he expressly requested this covenant from him, after

explaining the circumstances under which he (Gillespie) had purchased the car at the sheriff's sale. No case is made out of fraud or mutual mistake, and I cannot see how the sheriff can be relieved from his covenant. Hence he must indemnify the third party.

It may be, though I express no opinion, that the sheriff is entitled to be subrogated to the rights of the auto company as against Morton, but that is a matter outside the scope of this appeal.

The appeal should be allowed.

Irving, J.A.

IRVING, J.A.:—The plaintiff sues on a covenant contained in a bill of sale of a motor that the defendant had a right to assign and for quiet possession. Some months after the sale, the motor was taken out of his possession by one Morton, who held a chattel mortgage on it given by one Firth.

The defence in the dispute note was:—5. A denial that Morton was the mortgagee on the day of the seizure. 6. A denial that Firth, at the date of the mortgage, had any property or mortgageable interest in the motor.

The learned trial Judge dismissed the action "on the record." I presume that he refers to these pleadings.

In my opinion, there was a *primâ facie* case made by the plaintiff when he produced the registered mortgage and proved the signature thereto of Firth, who was the original purchaser of the car under the hire and purchase agreement. The plaintiff was, therefore, entitled to judgment and the third and fourth parties also. I would allow the appeal.

Since reaching the above conclusion, it has been suggested that, if time were given, Morton's mortgage might be bought up by the sheriff at a small figure and the sheriff enabled to give a good title to the car. I am agreeable to the proposal that counsel should be at liberty to speak to this point.

McPhillips, J.A.

MCPHILLIPS, J.A.:—I agree with the reasons for judgment of the Chief Justice, and that the appeal be allowed.

*Appeal allowed.*

ONT.

S. C.

## Re HAMILTON IDEAL MANUFACTURING CO. LIMITED.

*Ontario Supreme Court, Kelly, J. April 30, 1915.*

1. CORPORATIONS AND COMPANIES (§ VI B—323)—DISSOLUTION AND WINDING UP—NON-USER OF CORPORATE POWERS—DISPOSITION OF ASSETS.

It is the duty of the court, in the proper exercise of its discretion, to make an order for the winding-up of a company, under the Winding-up Act, R.S.C. 1906, ch. 144, sec. 11, where it appears that most of its assets had been disposed of and that no active business was being carried on or that it was being operated at a loss, and the principal person opposing the petition to its being wound up was its president, who was receiving a salary payable out of its assets.

Statement

PETITION by shareholders of the company for a winding-up order under the Dominion Winding-up Act, R.S.C. 1906, ch. 144.

*C. V. Langs*, for the petitioners.

*G. Lynch-Staunton*, K.C., for the company.

Kelly, J.

KELLY, J.:—The total number of shares of capital stock of this company issued and outstanding is 400, of which at the time of the filing of the petition 169 were held by the petitioners and 127 by D. H. Fletcher, the president and manager of the company; the remaining shares being held by others, principally in small lots. Of the three directors, two are petitioners.

The petition is for a winding-up, and also for an order appointing an inspector to investigate the company's affairs and management (Ontario Companies Act, R.S.O. 1914, ch. 178, sec. 126).

When the application first came before me, I directed that Mr. C. S. Scott, of Hamilton, should act under the provisions of this section; and on the 25th October, 1914, to which time the motion had been enlarged, he appeared before me and gave evidence submitting his report. I then directed that the information he supplied be submitted to a meeting of the shareholders to be called for that purpose, and the meeting was held on the 29th December, 1914. The motion was renewed before me on the 1st February, 1915.

The company was incorporated in December, 1904, by letters patent under the Ontario Companies Act, and carried on business until 1913. In the latter part of that year, it sold its lands and premises on which it carried on business, and its factory buildings, machinery, factory equipment, material on hand, and

its patents and some other chattels to the Nagrella Manufacturing Company. The latter company has since gone into liquidation, and is indebted to this company.

Apart from the record of what took place at the meeting of the 29th December, the only pieces of evidence submitted in opposition to the petition are affidavits of Fletcher, who resists the winding-up on the ground that no sufficient reason is shewn for such a course. He contends that the company is solvent, and capable of continuing in its business, and that any want of harmony in reference to its operations pertains to the internal management, with which the Court will not interfere.

The Winding-up Act, R.S.C. 1906, ch. 144, sec. 11, states several grounds on which the Court may make a winding-up order, amongst them being, (*d*) when the capital stock is impaired to the extent of 25 per cent. thereof, and when it is shewn to the satisfaction of the Court that the lost capital will not likely be restored within one year, and (*e*) when the Court is of opinion that it is just and equitable that the company should be wound up. In either of these cases, the application for winding-up may be made by a shareholder holding shares to the extent of at least $500. Each of the ten petitioners, at the time the petition was presented, was a holder of stock to at least that amount.

The Ontario Companies Act, R.S.O. 1914, ch. 178, sec. 187, provides that a corporation may be wound up, by an order of the Supreme Court, where, in the opinion of the Court, it is just and equitable, for some reason other than the bankruptcy or insolvency of the corporation, that it should be wound up.

There is a distinction between cases in which the real contention is on a question of internal management or mismanagement and cases where what may be termed the foundation upon which the company's business is based is shewn to have disappeared or to have become so weakened as to justify the Court's intervention, and in which a very strong case must be made out to induce the Court to interfere. But, where it is satisfied that the subject-matter of the business for which the company was formed has substantially ceased to exist, the Court will order a winding-up, although a large majority of the share-

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holders desire to continue to carry on the company: *In re Haven Gold Mining Co.* (1882), 20 Ch.D. 151.

In order to ascertain whether it is just and equitable that a company should be wound up, on the ground that its substratum is gone, the Court, generally speaking, must look only at the objects of the company as defined by the memorandum of association; but, if it is once established that a part of the substratum is gone, the Court is then bound to consider all the other circumstances in order to ascertain whether it is just and equitable that the company should be wound up: *In re Thomas Edward Brinsmead & Sons*, [1897] 1 Ch. 45. In his reasons for judgment in that case, Vaughan Williams, J. (at p. 61), says: "I think, therefore, that a part of the substratum is gone. I have already said that I do not think I ought to make an order because a part of the substratum of the business, as defined by the memorandum of association, has gone; but I am afraid that I am bound to come to the conclusion that it is a very material part. The price given . . . can only be accounted for on the basis that the user of this name and the goodwill attaching to this business were considered by the vendors and purchasers to be of great value. Under those circumstances I am perfectly clear that there is a state of things which would justify me in making a winding-up order if I thought it right in my discretion so to do—for I have a discretion." The order was made, and the learned Judge, in concluding his reasons, said that he thought the majority of the shareholders had a good business capable of being carried on.

The company now being dealt with was incorporated to buy, sell, and otherwise acquire and dispose of, farm implements and household appliances of all kinds, incubators, brooders, stock-raising apparatus, and machinery, and all articles that may be manufactured from wood or metal, and to buy, sell and otherwise dispose of raw material used in said manufacture.

Almost a year prior to the commencement of these proceedings, it made the sale of its assets above mentioned; and, outside of moneys due to it, its assets are comparatively of small value. There is no active business being carried on, and no

apparent prospect of a resuscitation of the business. Fletcher's allegations, that the business is being and can be successfully carried on as an agency or brokerage business, have not been shewn to have foundation, and I have the gravest doubts that such a business can be carried on, under the conditions shewn here, with profit to any one but Fletcher himself, or that the lost capital can thereby be restored. The operations of the business for one month about the time the petition was presented resulted in total sales (not profits on sales) amounting to $50, at an expense to the company of $125, practically all in wages, of which Fletcher, the president, received $50.

To account for the present proceedings on the part of some of the petitioning shareholders the president alleges that they have entered into business relationship or partnership amongst themselves in opposition to the business of the company; but the denial of these same parties is such as to put this allegation beyond the possibility of truth. His sworn statements as to this opposition are, so far as one can judge from the material before me, grounded on suspicion and supposition —not facts. His testimony is not supported by that of any other witness, while his statements are contradicted by the affidavits of a number of persons whom I have no reason to disbelieve.

The meeting of shareholders on the 29th December was called by direction of the Court with the object of eliciting the candid opinion of the shareholders in the light of the inspector's report. The sworn statement of what occurred at the meeting—and there is no evidence in contradiction of it—shews that Fletcher's conduct was so arbitrary and high-handed as, in my opinion, to make it quite impossible to get from the shareholders the candid, uninfluenced views which it was sought to obtain. This conduct was not in one matter alone, but extended throughout the meeting, and must have been intended to frustrate the object the Court had in view. The certificate of the result of the voting, signed by him as president and by the secretary of the meeting, shews that a majority in value of the shareholders voting were opposed to the winding-up, but the uncontradicted

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evidence as to the method by which this result was obtained deprives it of the value it was intended by the Court that it should have. There is the added fact that between the filing of the petition and the holding of the meeting 38 shares were transferred to persons who were not at the commencement of the proceedings shareholders, and these shares so transferred were represented at the meeting, and the weight of the votes in respect of them was thrown in opposition to the winding-up. Can it be said that these new shareholders were in a position to express a candid or intelligent view?

From the inspector's evidence it appears (and some of this is borne out by other evidence) that the company is without plant, machinery, manufacturing appliances, or patents; that it has an office, but the inspector does not know if it is doing any business; he says that practically it is not carrying on business; and that the capital of the company has been impaired to the extent of nearly one-half.

As is my duty, I have considered these facts, along with the other circumstances presented; and the only conclusion I can come to is, that there is little, if any, prospect of the company doing the business it was brought into existence to do; that the inevitable result of its continuing under the conditions to which it has been brought is to entail loss to every one financially interested in it, except perhaps to Fletcher, who, being in receipt of a salary payable out of its assets, is opposed to a course which will deprive him of that easily earned money. To my mind, the case is brought within the authorities which make it the duty of the Court, in a proper exercise of its discretion, to make the order for the winding-up.

Mr. C. S. Scott is appointed interim liquidator; and there will be a reference to the Local Master at Hamilton to appoint a permanent liquidator, fix the security, and for the other usual purposes.

*Petition allowed.*

## OTTAWA FORWARDING CO. v. WARD.

QUE.

C. R.

*Quebec Court of Review, Tellier, Mercier and Greenshields, JJ.*
*February 26, 1915.*

1. CARRIERS (§ III C—440)—GOODS—STIPULATION AS TO LIABILITY OF CARRIER—"AT OWNER'S RISK"—EFFECT OF.

Where the carrying of goods is stipulated in the bill of lading to be "at owner's risk," this does not have the effect of excusing a common carrier from its liability for damages caused by its fault, or the fault of those for whom it is responsible.

Statement.

APPEAL from the judgment of Lafontaine, J.

*McMaster* and *Papineau*, for the company.

*E. G. Place*, for Ward.

The judgment appealed from is as follows:—

Lafontaine, J.

LAFONTAINE, J.:—This case is a question of facts. The only questions of law were the principles of responsibility explained in the above holdings, which are based on the following "considérants" of the judgment of the Superior Court:—

Considering that admitting as proved the cross-defendant's pretension that, by special agreement with cross-plaintiff, the carrying of the bags mentioned in the bill of lading was undertaken by cross-defendant at owner's risk of frost, although the evidence on such an important and simple fact is strangely contradictory, for business and educated men with a good memory like the two witnesses who testified in the matter, one on behalf of cross-plaintiff and the other on behalf of cross-defendant; this stipulation cannot have the effect of excusing a common carrier from its liability for damages caused by its fault or the fault of those for whom it is responsible.

Considering that the conduct which is expected from a carrier, under his contract, is the conduct of a prudent owner, under the circumstances and subject to the conditions in which he is placed, and that the precise degree of care which is the duty of a carrier to use, in dealing with the goods entrusted to him, depends upon and vary with the nature and conditions of the goods carried, and of the ever-varying circumstances under which the goods are dealt with;

Considering that a common carrier undertakes safely and securely to carry and deliver the goods in the same condition in which he receives them, and that, when the cartage of goods is made by water, in rivers or island navigation, the question whether goods should be carried on deck or under deck depends,

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in absence of stipulation in the contract or of any established rule, on the nature of the goods, whether perishable or not, and of the period of the season of navigation.

The Court of Review confirmed this judgment.

ALTA.

S. C.

## CANADIAN NORTHERN WESTERN R. CO. v. MOORE.

*Alberta Supreme Court, Scott, Stuart, Beck, and Walsh, JJ. February 16, 1915.*

1. DAMAGES (§ III L 2—241)—EXPROPRIATION—VALUE—ESTIMATION OF—TIME.

The intention of the Railway Act, Alta., 1907, ch. 8, is to fix the last convenient date as that in reference to which the value of property expropriated shall be determined; if there is an agreement of sale the date of that agreement is taken or if there is a judge's order appointing an arbitrator, the date of that order is taken, but if no such order is required by reason of the parties agreeing on the third arbitrator, the value is fixed as of the date of the service of the notice to treat under sec. 101.

2. ARBITRATION (§ III—16)—VALIDITY OF AWARD—IMPROPER VALUATION AS TO DATES—EXPROPRIATION BY RAILWAY.

An award in expropriation proceedings under the Railway Act, Alta., 1907, ch. 8, is not invalidated because the arbitrators proceeded to fix the value as of the date of the arbitration instead of the date a few months earlier in the same year, when the appointment of the third arbitrator was made by a judge's order, if the case developed no distinction as to value between those dates and both parties at the opening of the arbitration had acquiesced in the arbitrators' suggestion that the present value should be the basis of compensation.

3. EVIDENCE (§ VII A—590)—OPINION EVIDENCE—STATUTORY LIMITATION AS TO NUMBER—APPLICABILITY TO EXPROPRIATION AWARDS.

Sec. 10 of the Evidence Act, Alta., limiting to three the number of witnesses on each side to be called to give opinion evidence applies to an arbitration under the Railway Act, Alta., 1907, ch. 8, to fix compensation for land compulsorily taken.

4. EVIDENCE (§ VII A—590)—OPINION WITNESSES — STATUTORY LIMITATIONS AS TO NUMBER—ELICITING OPINION ON CROSS-EXAMINATION.

Unless a party brings his own witness within the terms of sec. 10 of the Evidence Act, Alta., and makes him an opinion witness, such witness is not to be counted as one of the three witnesses who may be called upon either side to give opinion evidence merely because the opposite party brought out his opinion on cross-examination; but if the party who called him proceeds to re-examine in respect of such opinion, the witness is to be counted as his witness giving opinion evidence under the statute.

5. ARBITRATION (§ III—17)—SETTING ASIDE AWARD—DISREGARD OF STATUTE AS TO WITNESSES—OPINION EVIDENCE.

A disregard of the limitations of sec. 10 of the Evidence Act, Alta., limiting the number of witnesses to be called to give opinion evidence upon an arbitration subject to its provisions is a ground for setting aside the award and remitting the case to the arbitrators.

[*Rice* v. *Sockett*, 8 D.L.R. 84, followed.]

6. APPEAL (§ VII L 1—473)—APPEAL FROM AWARD—REVIEW OF FACTS—IMPROPER ADMISSION OF EVIDENCE.

Where the arbitrators admitted as evidence of value, matters which the court on appeal decided were inadmissible and which may have

materially affected the arbitrators' finding, the court hearing an appeal from the award is not bound under sec. 114 of the Railway Act, Alta. 1907, ch. 8 to decide the question of fact raised by the appeal as in a case of original jurisdiction; it is only where there is nothing but a question of fact involved that the court is bound under sec. 114 to decide the same upon the evidence taken before the arbitrators instead of setting aside the award or remitting the case.

[*Atlantic and N.W.R. Co.* v. *Wood*, [1895] A.C. 257; *Cedars Rapids Mfg. Co.* v. *Lacoste*, 16 D.L.R. 168, 83 L.J.P.C. 162, considered.]

7. EVIDENCE (§ IV G—423)—DOCUMENTARY EVIDENCE — AFFIDAVITS OF VALUE PREVIOUSLY TAKEN—ADMISSIBILITY.

The affidavit of value made by the executor of an estate on taking out probate may be admissible in evidence against the estate on an arbitration to fix the value of some of the lands belonging to the estate expropriated for railway purposes; the arbitrators should consider whether the time which had elapsed between the affidavit of value and the date as of which compensation was to be paid by the railway was such as to make the affidavit of little or no importance in fixing the value of the property at a later date.

[*New* v. *Hunting*, [1897] 1 Q.B. 607, referred to.]

8. APPEAL (§ VII L 1—473)—APPEAL FROM AWARD—JURISDICTION TO SET ASIDE OR REMIT.

The court hearing an appeal from an award under sec. 114 of the Railway Act, Alta., 1907, ch. 8, has jurisdiction on setting aside the award and remitting the case to the arbitrators to dispose of the costs of the abortive arbitration proceedings.

[*Cedars Rapids Mfg. Co.* v. *Lacoste*, 16 D.L.R. 168, 83 L.J.P.C. 162, referred to.]

Statement.

APPEAL under the Railway Act of Alberta.

*O. M. Biggar*, K.C., for appellant.

*Frank Ford*, K.C., for respondent.

The judgment of the Court was delivered by

Stuart, J.

STUART, J.:—This is an appeal under the Railway Act of Alberta, 1907, ch. 8, by the railway company against an award made by three arbitrators appointed pursuant to the provisions of that Act.

The arbitration proceedings began on December 16, 1913. At the opening the chairman made the following observation. "I suppose it is agreed the compensation must be on the basis of the present value." To this Mr. Greene, who appeared as counsel for the railway company, answered, "we are satisfied," and Mr. Moore, who appeared for the owner, answered, "yes."

The arbitration then proceeded and the award was admittedly made upon the basis of the value at the time of the arbitration.

One of the grounds taken in support of the appeal is that the arbitrators took the wrong date at which to fix the value. I

ALTA.

S. C.

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was at first inclined to the view that, notwithstanding the agreement above set forth, the most that could be said in support of the award would be that there was a submission to arbitration in a voluntary way outside of the Railway Act, and that the award would have to be dealt with upon that basis. But after reading the evidence I have concluded that it is not necessary to consider the matter in that way. There is nothing in the evidence to suggest that either any of the witnesses or the arbitrators or the counsel engaged thought that there was any distinction to be made between one part of the year 1913 and another part of that year, so far as the value of the land was concerned. The only distinctions made were between the value in 1913 and that in 1912 or in 1911. On the contrary there is ample in the evidence to shew that all parties, witnesses and everyone else, thought that the value in June, 1913, was just the same as the value on December 16, 1913, which latter was the date taken.

Now, the order of Mr. Justice Beck, made under sec. 105 of the Railway Act was made on June 25, 1913, and if that date, and not December 16, 1913, was the date which should have been taken, then it is obvious that no error was committed even if the agreement made at the opening of the proceedings would not control the matter. The question then is, was the date of the order the proper date to take? I think that it was.

A consideration of sees. 99 to 105 inclusive of the Railway Act (Provincial) seems to me to point clearly to the conclusion that the words "the service of such notice" in sub-sec. (2) of sec. 100 were intended by the legislature to refer to the notice, generally called, I believe, a "notice to treat," served under sec. 101 of the Act. It is true that there does not appear to be any definite direction in the Act that the notice mentioned in sec. 101 *shall* be served. But sec. 103, for example, allows an application to a Judge for substitutional service where the "opposite party," a phrase which seems to be intended to indicate the owner or person entitled to convey, cannot be found. Whether or not the notice provided for by sec. 101 is to be taken as the form in which "an application may be made to the owners, etc.," as provided in sec. 99, is perhaps not clear, but

my suggestion is that the use of that phrase in sec. 99, and a possible expectation that that application would be made by serving the notice referred to in sec. 101, may have been the reason why the phrase "the service of *such* notice" is used in sec. 100 although no notice, so designated, had as yet been spoken of.

Assuming then, that this is the correct interpretation of the words "service of such notice" in sec. 100, sub-sec. (2), it becomes necessary to consider further the general interpretation of that sub-section in regard to the time to be adopted for fixing the compensation. The sub-section reads as follows:—

> The date of such agreement or the service of such notice or the order of the Judge mentioned in sec. 105 shall be the time with reference to which any compensation or damages are to be ascertained.

Three different dates are here provided for and it is noteworthy that they are named in the order of time in which, in the natural course of the proceedings, they would occur. Sec. 99 says that ten days after the deposit of the plan, profile, etc., and the publication of notice thereof in a newspaper, the company may make application to the owners and thereupon agreements may be made in regard to the matter, including even an agreement as to the method of fixing the compensation. Therefore sec. 100, sub-sec. (2) takes care to fix a date if the parties at the very beginning do everything by agreement. It may be that by their agreement they could vary the date, but if in their agreement no mention is made of the date, then the sec. supplies the date to be taken. Next will come the case where it becomes obvious that the matter cannot be arranged by agreement. A formal notice under sec. 101 and a certificate under 102 then become necessary. The notice under 101 names an arbitrator. Then, under sec. 105, the owner may name an arbitrator and these two arbitrators may name a third. If all this proceeds without any difficulty no order of a Judge naming a third arbitrator is ever made. In such a case the date of the service of the notice under sec. 101 is fixed as the date at which the arbitrators must ascertain the value. Or if after the service of the notice under sec. 101 the parties then get together and make some arrangement, the date of the service of the notice would still apply. Finally, if the two arbitrators do not agree

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upon a third or if the owner never names an arbitrator at all, it then becomes necessary to apply to a Judge either to name a third arbitrator in the former case, or a sole one in the latter case, and the date of his order is then to be taken as the date at which the compensation is to be fixed.

I think the obvious intention of the Act is to fix the last convenient date occurring most recently before the actual fixing of the compensation. If the matter is arranged by agreement then the date of the agreement is taken. If a formal notice to treat has to be served, then, if it does not become necessary to apply to a Judge, the date of the service of the notice is to be taken. If, however, it finally becomes necessary to apply to a Judge, then the date of his order is to be taken.

In the present case the order was made on June 25, 1913. For the reasons I have given I think the fact that the arbitrators by consent of the parties took December 16 instead of June 25, in the same year, as the date cannot be considered as affecting the validity of the award.

Another objection taken to the award was that the provisions of sec. 10 of the Evidence Act had been infringed. That section reads as follows:—

10. Where it is intended by any party to examine as witnesses, persons entitled according to the law or practice to give opinion evidence, not more than three of such witnesses may be called upon either side.

By virtue of the interpretation section and of section (3) it is clear that this section applies to a proceeding by arbitration under the Railway Act.

The arbitration dealt with four different parcels of land. Four separate notices had been given by the company under sec. 101 of the Act, but it seems to have been agreed that one appointment of arbitrators should be made and the order of Mr. Justice Beck of June 25, 1913, was made with reference to all the four parcels.

At the arbitration proceedings the owner adduced his evidence first.

The first witness Welton, stated that he was the assessor and secretary treasurer of the village of North Red Deer, and that he made the assessment for the year 1913. He went on to state

the amount at which he had assessed the S.W. 1-4 of section 21. If he had done nothing more it might be a matter for argument, not only whether he was giving opinion evidence when he merely stated the amount of the assessment, but also whether such evidence was admissible at all, unless he in some way confirmed his assessment by stating his present opinion in the witness box. But with respect to this parcel he went further, in response to questions by the owner's counsel, and shewed how he had arrived at the assessed value and gave the reasons which "confirmed his valuation in assessment." I think this clearly amounted to the expression of an opinion upon the value of this quarter.

Then with respect to the north-west quarter of the same section, although this was not within the limits of the village of Red Deer, he was clearly asked to give his opinion as to its value, and did so by way of comparison with S.W. 1-4 which he had assessed.

I omit his cross-examination because it is the proper rule, I think, that unless a party brings his own witness within the words of sec. 10 and makes him an opinion witness the opposite party cannot do so by mere cross-examination. Upon re-examination he was more explicitly asked his opinion of the value of the south-west quarter, and also as to the effect of the presence of the railway upon the whole section number 21. Welton therefore gave opinion evidence with respect to three of the parcels in question.

The next witness called by the owner was one Stephenson, who stated that he was assessor for the City of Red Deer, and the Red Deer School District, and that he had made the assessment for 1913. He stated that as school assessor he had assessed the S.W. 1-4, the N.E. 1-4 and the N.W. 1-4 of section 21, at certain amounts, and then stated that in making his assessment he assessed, as nearly as he could, the value, "the actual value in his opinion."

He then turned to that portion of sec. 9, which was referred to in the proceedings as Addison Heights, and clearly was asked to give his opinion of what the proper assessment would be, presumably according to his method of assessment before ex-

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plained. Stephenson, therefore, gave opinion evidence with regard to the whole four parcels in question.

The next witness called was William A. Moore. He is a son of the owner, John T. Moore, but the latter was only owner as executor of the estate of Annie A. Moore, his deceased wife. It was contended that he should not in any case be treated as within the rule. But, quite aside from the possibility that even an owner himself, if he testifies to a matter of opinion, ought to be counted as one of the three opinion witnesses permitted, I am of opinion that the mere relationship of father and son could not place the witness in question in the position of an owner. If it had appeared that he was beneficially interested in the property in question, he might, no doubt, have had to be considered as a party, and then the question whether a party, who gives his opinion, should be counted as one of the three allowed, would have had to be decided. But, I see no reason for considering the witness in question as a party in any case. At the beginning of his examination, he was asked his occupation, which he gave as "electrical engineer and real estate." He was obviously called as an ordinary witness, having knowledge of real estate values, whose opinion would be of assistance to the arbitrators, and he should therefore be treated, so far as he gave his opinion as to values, as an opinion witness.

His testimony applied to all four parcels in question.

It is clear then, that at the conclusion of Moore's testimony, three persons had given opinion evidence with regard to the three quarters of section 21. Welton did not express any opinion upon the values in Addison Heights.

When the owner proceeded to call his next witness, Hogg, counsel for the railway made a strenuous objection, owing to the provisions of the Evidence Act, to the owner being allowed to call any further witness to testify as to their opinion. A long argument ensued, in which the arbitrators took part, upon the question whether persons who were personally acquainted with the property in question, and had visited and inspected it, should be considered as testifying to facts, or merely as giving opinion evidence within the rule.

The arbitrators at this point decided to hear the evidence of

Hogg, subject to the objection. Hogg gave evidence as to what, in his opinion, was the value of all four parcels. At this point, therefore, the rule if violated at all had been violated as to section 21, and the limit had been reached as to Addison Heights.

Next the owner called one, Von Aueberg. His evidence was objected to upon the same ground, but was admitted subject to the objection. He gave his opinion as to the value of the property in Addison Heights and thereby the limit laid down by the Act was exceeded, always assuming that the nature of the whole evidence was such as to come within the terms of the Act.

Ultimately, the arbitrators decided that the evidence of persons who had actually seen and inspected the property and testified as to their opinion of its value was not opinion evidence within the Act. In so deciding, I think, with much respect, that the arbitrators were wrong.

In Wigmore on Evidence, vol. 3, paras. 1917-1919, is to be found a very interesting account of the origin of the opinion rule. From this it appears that in older days the Courts of England, when dealing with lay witnesses, that is, persons who had no professional scientific knowledge and experience, did not consider that any rule was being violated, if these lay witnesses ventured an opinion provided it appeared that they had a personal knowledge of facts, upon which to base an opinion. The objection was first to *mere* opinion aside from any knowledge of the facts. But it was felt with regard to persons having skilled scientific knowledge, that it was absolutely necessary to admit their testimony in many cases, although they might have no actual personal knowledge of the facts. Originally such persons were treated, as Wigmore points out, more as expert assistants to the Judge, than as witnesses for the jury, but ultimately they became witnesses for the jury, and their *mere* opinion, though based on no personal knowledge, was admitted upon a hypothetical statement of facts. With regard to lay witnesses, as Wigmore points out, opinions from them were originally not excluded if they had a personal knowledge of facts, told what this knowledge was, and so shewed the ground of their

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opinion. But as time went on the rule was made more stringent. If it appeared after they had stated the facts within their knowledge to the jury, that the jury were then in just as good a position as they were to form an opinion, then their evidence of opinion was excluded, para. 1924. Their opinion was then superfluous. It was only in cases where the jury could not be put in as good a position as the witness, that he was allowed to go on and give his opinion.

Coming to the question of value, Wigmore, para. 1940, says:—

> Our orthodox common law was not troubled with any doubts concerning value-testimony as tainted with the vice of opinion. It recognized fully that value testimony necessarily involved "opinion," by which was meant a mere estimate as distinguished from a knowing through the senses. But it recognized that value testimony had to be employed, and it was precisely one of the typical accepted instances in which "opinion" was received.

The point, of course, is not whether opinion evidence is admissible, which is conceded, provided of course, the witness shews that he is qualified to express an opinion, but what constitutes *opinion* evidence within the meaning of the Act. There is no doubt that an opinion as to value, even though based upon actual observation and knowledge of the property, without which indeed it would be worthless, must be considered as, after all, opinion evidence within the meaning of the Act. As pointed out by Falconbridge, C.J., in *Rice* v. *Sockett*, 8 D.L.R. 84 at 85, 27 O.L.R. 410, the use of the word "expert" in the caption of the section does not restrict it to professional men. The words of the section extend to "one who by experience has acquired special or peculiar knowledge of the subject of which he undertakes to testify, and it does not matter whether such knowledge has been acquired by study of scientific works or by practical observation."

The result is that the arbitrators went contrary to the provisions of the Act in admitting the testimony, on behalf of the owner, of the additional witnesses as to value beyond the three already called.

One of the arbitrators, Mr. Welliver, seems clearly to have appreciated the purpose of the statute, when he said:—

It seems to me though there would have to be restrictions put on the amount of evidence given as opinion, because that could be kept up, and hold up the Court presiding for a considerable length of time.

This, in my opinion, renders the award invalid, and it must be set aside: *Rice* v. *Sockett, ubi supra.*

The further question remains to be considered as to what course we should pursue. Sec. 114 of the Railway Act is as follows:—

Whenever an award exceeds $600, any party to the arbitration may, within one month after receiving a written notice from any one of the arbitrators, or the sole arbitrator, as the case may be, of the making of the award, appeal therefrom upon any question of law or fact to the Court, and upon the hearing of the appeal, the Court shall, if the same is a question of fact, decide the same upon the evidence taken before the arbitrators, as in a case of original jurisdiction.

In my opinion it is impossible for us, for several reasons, to attempt to consider merely the admissible evidence and make an award ourselves. In the first place, the obligation placed upon the Court to decide the matter itself seems to be confined to the case where the appeal is upon a question of fact. In the present case, although one ground of appeal mentioned in the notice of appeal is that the amount of the compensation allowed is excessive and unreasonable and not warranted by the evidence, still the real point upon which we set aside this award is a point of law, namely, the admission of inadmissible evidence. I wish to be careful, however, to say, that I am by no means sure that we could in every case of some inadmissible evidence having crept in, avoid the obligation cast upon us by the statute to decide the matter ourselves. But it seems to me impossible in the present case to undertake such a duty particularly in view of the opinions expressed by the Judicial Committee in the case of *Atlantic and North-west Railway Co.* v. *Wood*, [1895] A.C. 257, as to the manner in which a Court of Appeal under an exactly similar section ought to deal with the award of the arbitrators. Their Lordships there decided that the Court of Appeal should not attempt to become arbitrators themselves, but should pay attention to the award of the arbitrators, and simply review it, as they would that of a subordinate Court in a case of original jurisdiction where review is provided for. In the pre-

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sent case it would be impossible for us to do anything of that kind. The arbitrators admitted very important evidence as to value, which we have decided was inadmissible. It is impossible to say what weight they attached to that evidence. It may quite well be that that evidence was the controlling evidence in their minds. Indeed, upon the strictly admissible evidence we have no award of the arbitrators before us at all; and although, if the inadmissible evidence allowed had been unimportant and obviously of little weight or significance, it might have been possible, in a proper case, to proceed to make a decision ourselves, following the direction of the statute, it seems clear that it would not be proper, and that we are not obliged to do so here. It would, moreover, be very unjust to the owner for us to do so, because, of the three witnesses he called, thereby exhausting his rights, two were only called to speak of the assessment, and one was, to some extent, interested as being connected with the family of the owner, and we should have to take that into account. It is fairly plain that the witnesses whose evidence would have to be excluded were the very ones upon whose opinion the owner placed the most reliance.

The final question is whether we should merely set the award aside, and allow the parties to begin *de novo* or remit the case to the arbitrators. There seems to have been some doubt, as to the Court's power, under such a section as we are acting under here, to remit the matter for the re-consideration of the arbitrators. It seems to me that any such doubt must be confined to a case where there is absolutely nothing but a question of fact involved.

In *Cedars Rapids Manufacturing Company* v. *Lacoste*, 16 D.L.R. 168, 83 L.J.P.C. 162, the Judicial Committee, in an appeal from the Superior Court of Quebec, District of Montreal, which had dealt with an award upon appeal, under the section of the Dominion Railway, which is in terms identical with those of our Provincial Act, gave a judgment remitting the matter to the arbitrators. The judgment there proceeded upon the ground that the arbitrators had acted upon a wrong principle in estimating the value of the land taken. The appellants, the expropriating company, had led evidence directed purely to agri-

cultural value, while the respondents had adduced evidence to shew how valuable the land taken was *to the appellants for the use of their works*. The Judicial Committee said that "the real question to be investigated was for what would these three subjects have been sold, had they been put up to auction without the Cedars Rapids Co. being in existence, but with the possibility of that or some other company coming into existence and obtaining powers." It was apparently because the evidence was not in a satisfactory condition, that the Judicial Committee made no attempt to fix a value themselves.

The question involved was in one sense a question of fact, viz: the value of the land taken, yet because the evidence had been directed to improper subjects, the Court remitted the award. For the reasons I have given, I think there are at least as strong grounds here for sending the award back, and this, I think, is the proper order to make.

It may be useful to refer the arbitrators to the judgment in *Seamen* v. *C.N.R. Co.*, 6 D.L.R. 142. The effect of that decision, as applied to the present case would be, that the actual value of each of the four pieces of land taken, may be treated as a separate and distinct fact, upon which three opinion witnesses may be called, while the increased or decreased value of the land surrounding the lands taken arising from the construction of the railway may also be treated as a separate fact as to which three opinion witnesses may be called.

Before concluding, I think reference should be made to a question as to the admissibility of certain evidence which the appellants tendered but which the arbitrators rejected. The appeal is to be allowed on other grounds, but as the case is to go back to the arbitrators, the same point will probably arise on the rehearing and it therefore is advisable that we should express our opinion in regard to it. The railway company tendered in evidence an affidavit made by John T. Moore to be used on his application as executor for probate of the will of Annie Moore. His signature to the affidavit was proven. Had he been the owner in his own right of the property in question there can be no doubt that this affidavit, in which he expressed an opinion as to the value of the property, would have been admissible

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against him as an admission. The only doubt which has existed at all arises from his position as executor. The law as to the admissibility of admissions made by a party suing or being sued in a representative capacity does not seem to be very clearly settled and there have been conflicting opinions. Wigmore, para. 1076 (2), says:—

> Where a party sues in a representative capacity, *i.e.*, as trustee, executor, administrator or the like—the representative is distinct from the ordinary capacity, and only admissions made in the former quality are receivable.

This would clearly admit the affidavit in question because it was made by Moore in his capacity as executor under the will in his application for probate. Again in *New, Prance and Garrard* v. *Hunting*, [1897] 1 Q.B. 607, Vaughan Williams, J., said, at page 611:—

> What a trustee says or does in the exercise of his duty is evidence against his beneficiaries.

And Wigmore 1076 (1), says:—

> Where the relation is not a fiction but represents a real relation of legal interest—as where the administrative and beneficial interests are divided between trustee and *cestui que trust*—it would seem that the admissions of the trustee should be receivable.

I think both upon authority and upon principle that the affidavit was admissible. But, of course, like any other admission it is not necessarily conclusive. It will be for the arbitrators to say what weight they will attach to it and in considering that matter the question whether Moore had any, and if so, what beneficial interest in the estate, will be quite relevant. They may consider also the circumstances under which the admission was made and the time at which it was made. If the time was so far removed from the time at which the value is to be fixed as to make the admission of no real assistance they may, of course, in their discretion, give no weight to it whatever. They might, I conceive, quite properly go so far as to reject it altogether upon this latter ground.

The respondents should pay the costs of the appeal. I think also that the terms of section 114 of the Railway Act are wide enough to give us jurisdiction to dispose of the cost of the first arbitration. The Judicial Committee in the judgment in *Cedars Rapids Manufacturing Co.* v. *Lacoste*, *supra*, quite clearly

considered that there was jurisdiction to deal with the costs of the first arbitration because they made a direct order that there should be no costs to either party of that proceeding. In the present instance I think the costs of the first arbitration should be paid by the respondents. They insisted in the face of the most strenuous objection in forcing in evidence which was inadmissible and the admission of which has rendered the whole proceeding abortive. *Appeal allowed.*



## LARSON v. ANDERSON.

*Saskatchewan Supreme Court, Elwood, J. May 1, 1915.*

1. COURTS (§ II A—150)—SUPREME COURT—LOCAL MASTER—APPLICATION AS TO COSTS—DEBT PAID PENDENTE LITE—JURISDICTION.

A Local Master of the Supreme Court of Saskatchewan has no jurisdiction under Sask. Rule 620 to entertain an application to dispose of the costs of an action in that court where the debt sued for had been paid *pendente lite*.

2. COURTS (§ II A—150)—INFERIOR COURT—NO JURISDICTION—OBJECTION—JURISDICTION CONTINGENT—OBJECTION—PROPER TIME FOR MAKING.

Where an inferior court had no jurisdiction in the matter from the beginning, the objection of want of jurisdiction is not waived by taking a step in a cause before it, or by failure to object at the commencement of the proceedings; but, if the jurisdiction is contingent, the defendant must object at the proper time if he desires to destroy the jurisdiction and in default cannot do so later.

[*Moore* v. *Gamgee*, 25 Q.B.D. 244, 248; *Farquharson* v. *Morgan*, 70 L.T.R. 152, referred to.]

Statement

ACTION to recover amount of a promissory note.

*G. A. Hogarth*, for plaintiff.

*L. R. Johnson*, for defendant.

Elwood, J.

ELWOOD, J.:—This is an action brought by the plaintiff to recover from the defendant the amount of a promissory note.

In his statement of defence, the defendant alleges that the note was not duly presented for payment, that the defendant had at all times been ready and willing to pay the note when the same should be presented, and that, since the issue of the writ, the plaintiff had presented the note and the same had been paid.

The plaintiff, on February 3, 1915, served a notice of motion returnable before the Local Master at Moose Jaw for an Order that the defendant do pay the plaintiff's costs of the action, up to and including the costs of and incidental to the motion, on the ground that all other questions in the action had been dis-

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posed of, except the question of costs and, in support of this motion, *inter alia* there was filed an affidavit of the solicitor for the plaintiff, stating that the note had, since the commencement of the action, been presented and paid, and that the only question remaining to be determined was the question of costs.

On the return of the motion, affidavits were filed by both parties, going into the question of payment of the money to the bank, and date of such payment and of the various dates of presentation of the note. An order was made on the application "that the defendant do pay the plaintiff the costs of this action, up to and including the costs of and incidental to this motion." From this Order the defendant has appealed on several grounds, among others that the Local Master had no jurisdiction to hear the application or make the Order.

Rule of Court 620, sub-sec. (*i*), provides as follows:—

A Local Master, in regard to all actions brought or proposed to be brought in the Supreme Court in his Judicial District, may transact all such business and exercise all such authority and jurisdiction in respect to the same, as under the Judicature Act, or these rules may be transacted or exercised by a Judge at Chambers, except in respect to the following proceedings and matters, that is to say:—

(*i*) Awarding of costs other than the costs of, or relating to, any proceeding before a Master and other than costs which by the rules of Court, or by the order of the Court or a Judge he is authorized to award.

In *Hunter* v. *Town of Strathroy*, 18 P.R. (Ont.) 127, Boyd, C., says:—

Some passages from Daniell's Ch. Practice concisely set forth the practice of the Court: "Except by consent it is only at the hearing, that the defendant can be ordered to pay the costs of the suit. The plaintiff is, therefore, entitled to bring the cause to a hearing for the purpose of determining the question of costs; although the defendant has, in other respects, submitted to the plaintiff's demands." (And at p. 128) "It may, therefore, be considered as settled that the Court will not, under any circumstances, on interlocutory application, make the defendants pay the costs of the action, unless they consent to have the costs so disposed of."

In the case at bar, it will be noticed that there were several issues raised by the defendant which would affect the right of the plaintiff to his costs of action, and these issues the Local Master assumed to determine on the application appealed from.

I am of the opinion that, under Rule 620, sub-sec. (*i*), above quoted, the Local Master had no jurisdiction to hear or determine the application. See *Hanson* v. *Maddox*, 12 Q.B.D. 100.

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It was objected on behalf of the plaintiff that the question of jurisdiction was not raised before the Local Master and that the defendant, having appeared and filed affidavit, owing to the merits of the matter could not now succeed on the ground of want of jurisdiction.

In *Farquharson* v. *Morgan*, 70 L.T.R. 152, at p. 153, Lord Halsbury is reported as follows:—

It has long since been held that where the objections to the jurisdiction of an inferior Court appears on the face of the record, it is immaterial how the matter is brought before the superior Court, for the superior Court must interfere to protect the prerogative of the Crown by prohibiting the inferior Court from exceeding its jurisdiction. That is to say, where want of jurisdiction appears upon the libel, as in an ecclesiastical Court, or upon the face of the record, and does not depend upon a mere matter of fact, and a cause is entertained by an inferior Court which is clearly beyond its jurisdiction, no consent of parties will justify the superior Court in refusing a prohibition.

And at p. 154, Lopes, L.J., is reported as follows:—

It also follows that you cannot give jurisdiction by acquiescence.

In *Moore* v. *Gamgee*, 25 Q.B.D. 244, p. 248, Cave, J., is reported as follows:—

In the course of the argument of the motion Erle, J., said: "Where an inferior Court has no jurisdiction from the beginning, a party, by taking a step in a cause before it, does not waive his right to object to the want of jurisdiction; but jurisdiction is sometimes contingent; in such case, if the defendant does not, by objecting at the proper time, exercise his right of destroying the jurisdiction, he cannot do so afterwards.

In the case at bar there was an absolute want of jurisdiction. I am of the opinion that jurisdiction could not be given by consent, and the result will be that the appeal will be allowed and the order appealed from discharged, and the motion, on which the order was made, dismissed.

As the question of jurisdiction was not raised before the Local Master, there will be no costs of the appeal to either party. The plaintiff will pay the defendant's costs of the motion before the Local Master. *Appeal allowed.*

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## McCUNE v. GOOD.

*Ontario Supreme Court, Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. April 26, 1915.*

1. DAMAGES (§ III A 3—62)—BREACH OF CONTRACT TO CONVEY—OPTION BY HUSBAND ON WIFE'S PROPERTY—NOMINAL DAMAGES.

An option to purchase inserted in a lease executed by the husband on land owned by the wife, which cannot be carried out because of the wife's disapproval, entitles the lessee, who had knowledge of the wife's ownership, to nominal damages as against the husband only, and not the ordinary damages such as the expense incurred in searching the title or for loss of profit on a resale.

Statement

APPEAL by the plaintiff from the judgment of BRITTON, J.

*W. A. Henderson*, for the appellant.

*G. W. Holmes*, for the defendant James Good, respondent.

*G. C. Campbell*, for the defendant Mary Good.

The judgment of the Court was delivered by

Hodgins, J.A.

HODGINS, J.A.:—The appellant could not succeed against the respondent Mary Good, and practically abandoned his appeal as to her on the hearing. It will, therefore, be dismissed with costs.

As regards the respondent James Good, the contention is, that he is liable for substantial damages owing to loss of a bargain or at all events for some damages.

The appellant at the trial admitted, both personally and by his counsel, that, before the lease was signed, he knew that the respondent Mary Good owned the property. The evidence is not satisfactory as to how the option came to be in the lease, and it so struck the learned trial Judge. But enough appears to shew that the respondent James Good knew about it afterwards, and it was not repudiated by him. Indeed, his present attitude is, that he is quite willing that the option should be carried out by his wife. She, however, refuses, and has done so all along.

The respondent James Good has broken his contract; and the question is, what damages flow from that breach in favour of the appellant?

The general rule was considered by this Divisional Court in *Ontario Asphalt Block Co.* v. *Montreuil*, 15 D.L.R. 703, and is thus stated at p. 708: "If the inability of the vendor to perform his contract is due to want of title or a defect in title, the rule is that the damages recoverable for the breach of con-

tract are limited to the expenses the purchaser has incurred. This rule is without exception, and applies even where the vendor enters into the contract knowing that he has no title to the land nor any means of obtaining it, though in that case the purchaser may have a remedy by action of deceit: *Bain* v. *Fothergill*, L.R. 7 H.L. 158."

It is true that in some cases this rule is not applied, as where the vendor has wilfully omitted to do some act necessary to complete the contract, or has done something to prevent its performance; but these cases are referable to the principle that no one is allowed to take advantage of his own wrong, rather than to the general rule as exceptions thereto.

Both parties contracted with the knowledge that the respondent James Good lacked the ownership necessary to complete the transaction, and that he had no right to get the title. In other words, both knew that the option was valueless when given, and that, if accepted before any change had occurred which would vest the property in James Good, it could not be carried out.

The acceptance, therefore, was the formal completion of a contract with the knowledge that it was completely nugatory so far as the property was concerned—giving at most a right only to those damages which would naturally flow from a breach of such an agreement, in the contemplation of both of the parties to it.

Although in *Robinson* v. *Harman* (1848), 1 Ex. 850, evidence that the purchaser knew when he entered into the bargain that the vendor had no title was rejected by Lord Denman, C.J., on the ground that it was inconsistent therewith, the defendant having pleaded admitting the contract, and the rejection was upheld by the Court of Exchequer, yet the decision in *Bain* v. *Fothergill* appears to protect vendors in all cases of want of title: *Rowe* v. *School Board for London* (1887), 36 Ch.D. 619, 625; *Morgan* v. *Russell & Sons*, [1909] 1 K.B. 357. The evidence, whether admissible or not (see *In re Jackson and Haden's Contract*, [1906] 1 Ch. 412, 425), would certainly be received in an action for deceit: *Gray* v. *Fowler* (1873), L.R. 8 Ex. 249, 282.

In an ordinary sale and purchase agreement, the damages

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would not include anything in respect of what had occurred after discovery of the defect or absence of title: Mayne on Damages, 8th ed., p. 240; *Pounsett* v. *Fuller* (1856), 17 C.B. 660.

Applying that rule, there would seem to be no right to recover even the ordinary damages such as the expenses incurred by the purchaser in searching the title etc.—much less damages for loss of profit on a resale. There is no definite evidence that the title was ever really searched; and the letter of the appellant's solicitor of the 4th February, 1914 (exhibit 6), shews that whatever was done in that direction took place in advance of the acceptance of the option on the 11th April, 1914.

In either view, therefore, those expenses are not recoverable. But nominal damages may, I think, be recovered, because the respondent James Good left the option standing after he knew it was in the lease, and neither repudiated its insertion nor attempted to withdraw it. The other party had the right to sue for breach of contract after acceptance. But I cannot think that those damages should carry the whole costs of the action for specific performance against this respondent, which the appellant must have known was bound to fail. It is perhaps reasonable to allow the appeal as against the respondent James Good to the extent of substituting for the judgment appealed against, one giving him $5 damages and $25 costs of an action for nominal damages, which would probably not have been contested. The circumstances do not warrant imposing any further payment on this respondent for the costs of the appeal.

*Appeal allowed in part*

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## HEINRICHS v. WIENS.

*Saskatchewan Supreme Court, Haultain, C.J., Newlands, Lamont, and McKay, JJ. March 20, 1915.*

1. DAMAGES (§ III K—229)—PERSUASION TO STOP TRADING—BY ECCLESIASTIC—RIGHT TO STOP TRADING—NO THREATS OR INTIMIDATIONS—NOT ACTIONABLE.

For a person to persuade another to refrain from doing something which the other may lawfully refrain from doing, such as the forbidding by an ecclesiastic of the members of his church from trading with the plaintiff, is not an actionable wrong, although the plaintiff's trade is injured thereby, if there is no allegation of threats, intimidation, molestation, conspiracy or other unlawful means.

[*Allen* v. *Flood*, [1898] A.C. 1; *Lyon* v. *Wilkins*, [1899] 1 Ch. 255, applied; *Quinn* v. *Leatham*, [1901] A.C. 495; *Giblan* v. *Labourers' Union*, [1903] 2 K.B. 600, distinguished; *Heinrichs* v. *Wiens*, 21 D.L.R. 68, affirmed.]

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APPEAL by the plaintiff from the judgment of Brown, J., 21 D.L.R. 68.

*B. H. Squires*, for appellant.

*J. F. Frame*, K.C., for respondent.

The judgment of the Court was delivered by

HAULTAIN, C.J.:—This is an appeal from the judgment of my brother Brown, by which he finds that the statement of claim in this action does not disclose any cause of action.

The statement of claim is as follows:—

1. The plaintiff is and has been for several years a merchant at the village of Osler in the Province of Saskatchewan, dealing particularly in the sale of oils and gasoline to the inhabitants of the village of Osler aforesaid and nearby villages and surrounding country.

2. Practically all the inhabitants of the said village of Osler, the nearby villages and surrounding country are of the Mennonite faith and are members or adherents of the Neuanlage Mennonite Church, of which the defendant is the Bishop.

3. On or about December 7, 1913, and on divers and various occasions since the defendant by instructions and teachings in his capacity as Bishop, as aforesaid, unlawfully ordered and forbade the members and adherents of the said Neuanlage Mennonite Church, practically all of whom were customers of the plaintiff, to have any dealings whatsoever with the plaintiff.

4. By reason of the defendant's position and influence as such Bishop, over the customers of the plaintiff, the defendant's teachings and instructions aforesaid were obeyed and by reason thereof the customers of the plaintiff did cease to have dealings with the plaintiff in his business as merchant as aforesaid whereby the plaintiff has been deprived of his trade in the community and of the profits of his trade which he had previously enjoyed in the community and has been utterly ruined in his business aforesaid.

5. The plaintiff previous to December 7, 1913, had 350 customers dealing with him in his business aforesaid, but by reason of the defendant's instructions and teachings aforesaid the plaintiff's customers now number only 20.

6. On or about December 7, 1913, the plaintiff had in his possession and owned by him stock-in-trade and fixtures to the value of $3,000, which the plaintiff is unable to sell and which had become a total loss to him.

The pleading in effect alleges that in consequence of the action of the defendant certain persons have abstained from trading with him. There is no averment of "malice" in the sense of a "wrongful act done intentionally without just cause or excuse." The word "unlawfully" is used in para. 3, but its use in that connection only begs the question. It is not set up

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that the defendant induced the breach of any contract which might have brought the case within the decisions in *Lumley* v. *Gye*, 2 El. & Bl. 216; *Bowen* v. *Hall*, 6 Q.B.D. 333, and *Temperton* v. *Russell*, [1893] 1 Q.B. 715. There is no allegation of threats, intimidation, molestation or conspiracy to which to apply the cases of *Tarleton* v. *McGawley*, 1 Peake 270, and *Garret* v. *Taylor*, Cro. Jac. 567. The case of *Giblan* v. *Labourers' Union*, [1903] 2 K.B. 600, was much relied on by counsel for the appellant, but in that case there was what was held to be an unlawful combination to compel employers not to employ the plaintiff. The case of *Quinn* v. *Leatham*, [1901] A.C. 495, was also cited, but that case does not apply in the present instance, as it was held there that a combination of two or more without justification or excuse to injure a man in his trade by inducing his customers or servants to break their contracts with him or not to deal with him or continue in his employment is, if it results in damage to him, actionable.

This case, in my opinion, comes clearly within the principle of the decision in *Allen* v. *Flood*, [1898] A.C. 1. That case may fairly be said to decide that it is not actionable merely to induce or persuade another not to enter into a contract with a third person even if it is done maliciously and although the third person suffers damage.

It is not an actionable wrong to persuade a person to do something which he may lawfully do or to refrain from doing something which he may lawfully refrain from doing even if the result is injury to another in his trade.

Persons may be peacefully persuaded provided the method employed is not a nuisance to other people. Per Lindley, M.R., *Lyon & Sons* v. *Wilkins*, [1899] 1 Ch. 255, at 268.

It may be added that persons may be persuaded, where no breach of contract is caused, unless there is added to the persuasion intimidation, threats, molestation or other illegal means.

In this case there is no violation of a legal right alleged, no unlawful act on the part of the defendant charged, and no suggestion of his use of unlawful means. The statement of claim, therefore, does not disclose any cause of action, and this appeal should therefore be dismissed with costs.

During the argument in appeal, application was made to

amend the statement of claim by adding the following paragraph:—

3a. The defendant had by virtue of his position as such Bishop authority to compel such members and adherents not to have any dealings with the plaintiff.

This amendment, it seems to me, if allowed, would effectually put the plaintiff out of Court, if he had not been out before. If the defendant had "authority"—and that must mean legal authority—there is nothing more to be said.

*Appeal dismissed.*

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## DODIER v. QUEBEC CENTRAL R. CO.

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*Quebec Court of Review, McCorkill, Roy, and Dorion, JJ.*

1. RAILWAYS (§ II D 6—70)—ANIMALS AT LARGE—DEFECTIVE FENCE—INJURY—STATUTORY DUTY TO REPAIR FENCES.

A railway company having been incorporated under Quebec Statute and never having been declared to exist for the general benefit of Canada, or to come under the provisions of the Dominion statute, is only obliged to build and keep in repair such fences as were required for the protection of the animals belonging to the adjoining owner, or of those who were rightly occupying the adjoining land.

Statement

THE plaintiff, a farmer, sues defendant for the sum of $160, the value of four cows one of which belonged to himself, the other three of which he took in pasture for some people of Thetford, which said cows were killed on defendant's railway track.

The line fence between plaintiff and his neighbour, Bouffard, was in defective condition. The animals passed through the line fence on to Bouffard's property; from there they got into the highway; thence into a field belonging to a farmer, named Blais. This field adjoined the defendant's railway line. The fence dividing Blais' property from the railway line was a wire fence. Some one in the employment, neither of the plaintiff nor of the defendant, cut all but the lower strand of wire between two of the posts. On the occasion in question, the cows passed, through this opening in the fence, onto defendant's railway track, where they were killed by one of the defendant's trains.

They are alleged to have been worth $40 each, and the plaintiff, having been responsible to the owners, and having paid them the damage sustained, seeks recovery from the defendant of the total damage caused.

The defendant denies responsibility for the death of these

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animals and alleges that it was due to the defective condition of plaintiff's line fence, through which they escaped; that the cattle were straying and at large through the fault and negligence of the plaintiff himself; that his pasture from which they escaped, did not adjoin defendant's railway line, and that, if his line fence had been in proper condition, they would not have escaped to the highway and would not have got to defendant's railway track, and claims that it is not liable.

The judgment of the Superior Court maintained the action.

*S. Deschamps*, K.C., for plaintiff.

*T. Légaré*, for defendant.

The judgment of the Court was delivered by

McCorkill, J.

McCORKILL, J.:—First, the Judge examined the organic statutes of the company defendant, and arrives at the conclusion that the company, in the operation of its line, with the exception of the provisions of R.S. 1909, ch. 3, art. 8, was always and now is governed by the railway law of the province of Quebec.

The parties to this case are agreed on this point and the judgment appealed from so declares. The railway law of Quebec, applicable to this case, is found in the R.S.Q. 1909. With respect to railway fences, art. 6606 contained the law [Citation.]

Art. 6606 R.S.Q. is practically the same as art. 11 of 32 Viet. (Que.) ch. 51, which is the Railway Act of 1869.

The only difference between the two sections is in the following clause. The statute of 1869 reads: "with proper fastenings, *at* farm crossings of the road." Article 6606 reads: "with proper fastenings, *and* farm crossings on the road."

It is also the same as 31 Viet. (Can.) (1868), ch. 68, sec. 11 and 14-15 Viet. (Can.) (1851), ch. 51, sec. 13. That the law, with respect to fences, under the Quebec statutes, is exactly the same to-day as it was in 1869, and as the Canada Act of 1851, and the Dominion Act of 1868, is a most important factor, in adjudicating upon the obligations of the defendant and the rights of the plaintiff. (See also 43-44 Viet. (Q.) ch. 43, sec. 16; R.S.Q. (1888), sec. 5171).

The first Dominion law, as to railway fences, sec. 11 of 31 Viet. Can. (1868), ch. 68, is the same as the Quebec statute of 1869 (32 Viet. (Q.) ch. 51, sec. 11); the qualification, "if there-

unto required by the proprietors of the adjoining lands," appears in both sections and of the English law of 1845.

The Dominion statutes remained practically unchanged except that by 46 Viet. ch. 24, sec. 9, the Act of 1879, sec. 16, was so amended as to require the notice of the adjoining owner, to the railway company to be in writing, until a new railway law was enacted by 51 Viet. (1888), ch. 29, sec. 194.

By this statute, it is apparent that Parliament intended the fencing should, for the future, be for the protection of the general public.

It was not left, for the future, to the adjoining owner to say, by notice to the railway company, when it must build its fence; it became obligatory upon the railway company thereafter to fence, whether the adjoining owner wished it or not.

Under previous Acts, whereby railway companies were obliged to build fences upon demand of the adjoining owners, the company's liability, for damage to cattle, upon its track, because of the absence of such fences, was limited to the proprietor or legal occupant of the adjoining land: See Abbott's Railway Law of Canada, page 397, with authorities cited under note 1.

The damages referred to in sec. 3 of 6606 to cattle straying from adjoining land on to the track is limited to cattle of the owner of the adjoining land or of which he has charge.

Under the statute of 1888, the liability of the company was not only to the proprietor of the adjoining land, but to every one whose cattle did not wrongfully get on the railway.

The law of 1888 and subsequent Dominion statutes are altogether different from previous Dominion statutes and from article 6606 R.S.Q. which, as I have already said, is the same today as it was in 1869; judgments based on the clause of the statute of 1888 and subsequent acts have no bearing, therefore, upon this case, on the question in issue.

The Ontario law, as it exists at present, is to be found in R.S.O. ch. 207, sec. 30:—

> Fences shall be erected and maintained, on each side of the railway, with openings, or gates, or bars therein, at farm crossings of the road, *for the use of the proprietors* of the lands adjoining the railway.

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I have not had access to the statutory laws of Ontario between Confederation and 1897, when the revised statutes were passed, but I think we may reasonably presume that, according to the Ontario law, the building of fences along its railway was for the accommodation and protection of the adjoining owners. See MacMurchy & Denison, Railway Law of Canada, 1st ed., p. 309, 2nd ed. (1911), p. 353.

A large number of Ontario cases are reported in support of this doctrine. The Ontario cases are equally applicable to the Quebec railway law, R.S.Q. 6606, all of which hold that the fencing of the railway line is for the protection of the adjoining proprietor and of those, of course, who are using the adjoining land with the permission previously given of the adjoining proprietor, and whose cattle are, by agreement, rightly on the adjoining land. The doctrine was laid down by the Court of Appeal of Manitoba, in the case of *Hunt* v. *G.T.P. Ry.*, 9 Can. Ry. Cas. 365, that "the building of fences along a railway is prescribed only to protect the adjoining landowners from loss by their animals being killed or injured on the track."

It is well also to see what the law of England was, in order, that we may better appreciate the applicability of certain authorities which I have to cite in support of the conclusion I arrive at. By sec. 68 of the Imperial statute 8-9 Vict. (1845), ch. 20, intituled: "An Act for consolidating in one Act certain provisions usually inserted in Acts authorizing the making of railways," railway companies were required to make and maintain certain works "for the accommodation of the owners and occupiers of the lands adjoining the railway."

Among the works were "fences for separating the land taken for the use of the railway from the adjoining lands not taken, and protecting such lands from trespass, or the cattle of the owners or occupiers thereof from straying thereout, with all necessary gates, etc."

The English case of *Ricketts* v. *The East and West India Docks*, 12 C.B. 160, already referred to, holds: "The duties imposed upon railway companies by the Railway Clauses Consolidation Act of 1845 (8-9 Vict. ch. 20, sec. 68, as to making and repairing fences between their railway and the adjoining lands,

is not more extensive than that imposed upon ordinary tenants by the common law. Therefore, where the plaintiff's sheep escaped from his close, through his own defective fence, and getting into the intervening close of a third party, escaped thence to the railway track and was killed, held that the company was not liable." See the remarks of Chief Justice Jarvis. See also *Luscombe* v. *G.W.R. Co.*, [1899] 2 Q.B. 313.

The following are some judgments of our own Court to the same effect which, it seems to me, are conclusive on the question in issue in this case: *Roux* v. *G.T.R.*, [1864] 14 L.C.R. 140, [Stuart, J.]; *Moffette* v. *G.T.R.*, 16 L.C.R.P. 231; *Jasmin* v. *C.P.R.*, 6 L.N. 163; *Fouchon* v. *O. & Q. Ry. Co.*, 11 L.N. 74; *Morin* v. *A. & N.W. Ry.*, 12 L.N. 89; *Ratwell* v. *C.P.R.*, 12 L.N. 241; *Holt* v. *Meloche*, 34 J. 309 (Q.B.); *Cross* v. *C.P.R.*, 3 K.B. 170.

The only clause of the Revised Statutes of Quebec, 1909, which relates to cattle being at large is 6536. It reads:—

> No horses, sheep, swine or other cattle shall be permitted to be at large upon any highway, within half a mile of the intersection of such highway with any railway on the level, unless such cattle are in charge of some person or persons to prevent their loitering or stopping on such highway, at such intersection.

The corresponding sections of the Revised Statutes of Canada, ch. 37, as amended by 9-10 Edw. VII. ch. 50, sec. 8, as secs. 294, 551.

Subsection 1 is the same as the Quebec section. Subsections 2, 3, 4 and 5 of the Dominion Act were never incorporated into the Provincial Act. Section two refers to the impounding of cattle at large; three: no right of action for killing cattle at large; four: provides that the owner of cattle killed, whether upon the highway or not, will be entitled to recover, unless the company establishes they got at large through the negligence or wilful act or omission of the owner or custodian; five: preserves the right of recovery against the company, if the animal was killed on the company's property, elsewhere than on the intersection of the highway.

The facts of the case of *Carruthers* v. *C.P.R. Co.*, 39 S.C.R. 251, is nearly identical with the present. The only difference is that, in that case, the animals were horses and the highway upon which they were at large ran parallel to the railway. They escaped from their pasture to the highway; from there to an-

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other field adjacent to the railway; thence to the track, through an opening which had never been provided with a gate, and were killed.

The judgment in favour of the plaintiff (pp. 255, 256 and 257) was founded upon sub-sec. 4, above referred to, which required the company to prove that the horses were at large through the negligence of the owner, which it had failed to do. Sec. 4 saved the plaintiff; his action would otherwise have been dismissed.

But even had the case been governed by the Dominion statute, in my opinion, plaintiff would not have been entitled to recover. See R.S.C. ch. 37, sec. 295.

After very carefully considering the statutory law and the decisions based thereon, which maintain that a railway company is not obliged to fence its line at common law, and is only required to build such fences for the purposes and to the extent prescribed and mentioned in the statutes, I have come to the conclusion that the defendant company was not liable for the death of these animals.

The defendant-company having been incorporated under the Quebec statute; never having been declared to exist for the general benefit of Canada, or to come under the provisions of the Dominion statute, it was only obliged to build and keep in repair such fences as were required for the protection of the animals belonging to the adjoining owner, or of those which were rightly occupying the adjoining land, with the consent of, and by agreement with, the adjoining owner, that the animals in question had strayed from the pasture where they were placed by plaintiff's employee, through the boundary fence enclosing said pasture, and that plaintiff was responsible *quo ad* defendant for negligence in connection therewith; that the animals were astray on the property adjoining defendant's railway line, and, therefore, escaped from a place, where they had no right to be, on to defendant's railway, for none of which facts and circumstances can the defendant be held responsible under section 6606 R.S.Q.

I am of opinion, therefore, that there was error in the judgment appealed from in condemning defendant to pay.

*Appeal allowed.*

## APPLETON v. MOORE.

B. C.

C. A.

*British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher, and McPhillips, JJ.A. August 10, 1915.*

1. EVIDENCE (§ XIF—790)—RELEVANCY — PRICES AND VALUES—FRAUDULENT SALE OF SHARES — MISREPRESENTATIONS AS TO ASSETS — ACTION FOR RESCISSION.

In an action for the rescission of a sale of shares on the ground of fraudulent misrepresentations as to the assets of the corporation due to an exchange of timber lands, a question in the examination of the defendant for discovery as to whether he disposed of the lands or utilized them for profit, or raised money upon them is irrelevant to the issue.

Statement

APPEAL from judgment for plaintiff in action for rescission of sale of shares.

*H. B. Robertson*, for appellant.

*Maclean*, K.C., for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The action is brought by the plaintiff (respondent) to rescind, on the ground of fraudulent misrepresentations, a sale to him by the appellant of certain shares in the Canadian Puget Sound Lumber Co. Ltd. The representations complained of as set out in the statement of claim were that the assets of the company were intact and that the company held all the valuable timber known as the Sayward holdings. There are other alleged misrepresentations but they do not affect the point at issue in this appeal. It is alleged in the statement of claim that the representations above referred to were knowingly and fraudulently false. The alleged falsity consists in this, that before the sale the defendant and his co-directors of the said company had passed a resolution in favour of exchanging sections 1 and 9, part of the Sayward holdings with another company, the Menzies Bay Lumber Co. Ltd., for certain timber limits belonging to the latter company, and that subsequently to the sale, the exchange put in train by that resolution was actually carried out, and the Court will be asked on the trial to declare that the assets in the true sense were not at the time of the sale of the shares intact, and that the company did not at that time own all of the Sayward holdings. Whether a good case in law is made out by the statement of claim is not a question which I have to consider, the point before me is one of evidence. On examination of the defendant for discovery he was asked this question:—

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You still own them; yes; but first of all you raised $200,000 on them, didn't you?

which, on advice of counsel, he declined to answer. The Order appealed from orders him to answer it. I gather from the context that defendant was being questioned not as to what he personally did, but what the Menzies Bay Lumber Co. Ltd., in which he was largely interested, did in respect of said sections 1 and 9, after it acquired them pursuant to said resolution of exchange.

I think the question was irrelevant. It was doubtless proper having regard to the issues aforesaid to bring out the fact that said sections 1 and 9 were of appreciable value and that therefore the representations were not immaterial. The case which the plaintiff had to make out was that he had been induced to purchase the shares by false and fraudulent representations. If the assets were not intact and if the company did not hold all the Sayward holdings, the plaintiff might be entitled to relief, but I am unable to see how his case could be aided by shewing what the purchaser did with the alienated lands after the alienation—whether the purchaser disposed of them or utilized them for profit, or raised money upon them has nothing to do with the issue raised by his statement of claim. It seems to me that the question is the entering of the wedge in an attempt to do what this Court on a former appeal on a matter of pleading decided could not be done in this action, namely, to shew that there was a fraudulent conspiracy between the defendant and others to rob the said Canadian Puget Sound Lumber Co. of its assets by means of the said exchange.

The appeal should be allowed and the question disallowed.

Martin, J.A. (dissented)

MARTIN, J.A., dissented.

Galliher, J.A.
McPhillips, J.A.

GALLIHER, and MCPHILLIPS, JJ.A., concurred with MACDONALD, C.J.A.

*Appeal allowed.*

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## INTERNATIONAL HARVESTER CO. v. LEESON.

*Saskatchewan Supreme Court, Newlands, Brown, and Elwood, JJ. March 20, 1915.*

1. JUDGMENT (§ II A—60)—IDENTITY OF PARTIES—PLEA OF RES JUDICATA—SECOND ACTION BY DIFFERENT COMPANY—NO ASSIGNMENT.

The identity of the parties is necessary to support a plea of *res judicata* and such defence is not available where the first action was brought by a different company from the company suing in the second action and was dismissed because there was no assignment by the latter to the former of the claim sued upon.

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2. SALE (§ III A—51)—CONDITIONAL—GOODS RETURNED BY VENDEE—NO RIGHT TO RETURN—ACTION ON LIEN NOTES—VENDEE'S RIGHT TO DEFEND.

Where there has been no breach of warranty by the conditional vendors and there is no right to return the goods, the conditional vendee who has returned them to the premises of the conditional vendor is not thereby entitled to defend an action brought by the latter on the lien notes where the conditional vendor has not exercised its right to repossession and has done nothing inconsistent with the right of the conditional vendee to the possession of the chattels in question.

APPEAL by the defendant in an action to recover on lien notes. Statement

*J. A. Allan*, K.C., for appellant.

*J. S. Rankin*, for respondents.

The judgment of the Court was delivered by

NEWLANDS, J.:—This is an action on three lien notes, one of them given for part of the price of a disc and harrows and the other two for the price of a set of plows bought by defendant from plaintiff company. To this action the defendant sets up two defences. First, as to the whole claim that it is *res judicata*, and second, as to the notes given for the plows, that there was no consideration or rather that the consideration failed, plaintiffs having taken them back. Newlands, J.

As to the first defence: the defendant was previously sued on these same notes by the International Harvester Co. of Canada. This action failed, as the learned trial Judge says in his judgment in this case, because:—

> In that action I nonsuited the plaintiff company on the ground that it had no right of action in the lien notes sued on, they being made in favour of the International Harvester Co. of America. In that action no assignment to the International Harvester Co. of Canada, which was shewn to be a separate company, was pleaded, and no attempt was made to prove an assignment.

I think this statement is a complete answer to the plea of *res judicata*, the plaintiff in the former action having failed because the property in the notes sued on was not in it but in the plaintiff in the present action, a distinct and separate corporation.

One of the principal ingredients to support the plea of *res judicata* is here lacking, that is the identity of the parties, the plaintiff in the former action having failed because the plaintiff in this action was a distinct corporation and there was no assignment from it to the plaintiff in such former action. The reason for plaintiff in the first action failing, that it was not identical

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with nor a successor of the plaintiff in this action is a complete answer to the plea of *res judicata*.

The defendant also argues that the first action was also dismissed because plaintiff failed to prove consideration. I do not think that this makes any difference upon this question, because the trial Judge's judgment shews that his real reason for dismissing the first action was the reason given above, *i.e.*, that the plaintiff in the first action had no title to the notes sued on.

As to the second defence, that the plows did not comply with the implied warranties and that defendant returned same and that plaintiffs accepted same and the contract was thereby rescinded, the learned trial Judge found that there was no breach of warranty on the part of plaintiff but that, if the plows failed to work, it was the fault of the defendant. As this finding was made on contradictory evidence I do not think we should disturb it. Now, the defendant's only right to return the plows, the property in them not having passed to him, would be because they did not answer the warranty given by plaintiff and as the trial Judge has found that there was no breach of warranty, then he had no right to return them. That he did take them back and that plaintiffs moved them with their other property from the old Forward to the new town is no evidence that they accepted them back and rescinded the contract. The town having been moved, it is natural that everything on plaintiffs' premises would be moved and I agree with the finding of the trial Judge that the plaintiff company never in any way exercised its right of repossessing the plows, nor was anything done inconsistent with defendant's right to it.

I am therefore of the opinion that the appeal should be dismissed.

*Appeal dismissed.*

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B. C.

C. A.

## BESELOFF v. WHITE ROCK RESORT DEV. CO.

*British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher, and McPhillips, JJ.A. August 10, 1915.*

1. MECHANICS' LIENS (§ V—32)—CLEARING OF TOWNSITE—EXTENT OF LIEN—SEVERAL TRACTS—EXCEPTIONS AS TO HIGHWAYS.

The lien for work done in clearing a townsite consisting of several tracts extends to the whole land benefited by the work within the meaning of sec. 6 (*c*) of the Mechanics' Lien Act (B.C.), except whatever may be excluded from it by sec. 3, as being "a public street or highway."

APPEAL from judgment for defendant in action under the Mechanics' Lien Act.

*S. S. Taylor*, K.C., for appellant.

*W. J. McQuarrie*, for respondent.

MACDONALD, C.J.A.:—The appeal should be allowed. The contract bound the plaintiff to clear the whole tract of 320 acres, and while there were terms in the contract entitling defendant company to terminate it, or by withholding instructions to reduce the area to be cleared, yet it was the whole tract and not the lots or blocks into which it had been subdivided, which formed the subject-matter of the contract.

As there is no evidence to shew the interest, if any, of the public, or of purchasers of lots, if any, in the streets shewn on the plan, I am unable to say whether they should be excepted from the operation of the lien as being public highways, that question can be decided by the learned Judge below when the case goes back to him. But in any event the appellant has a lien on the rest of the property for the value of the work done on the streets.

The judgment below is based on two grounds—(1) that the character of the work done was not shewn to have been approved by the defendant company, it being a term of the contract that the work should be done to the satisfaction of the company or its representative; and (2) the work contracted for was not finished.

It is undisputed that the work was discontinued because the company had declared its inability to pay for it. It took no steps to inspect the work for approval, nor to provide the money stipulated to be paid monthly; it repudiated the contract by declaring that it could pay nothing. The plaintiff's claim is therefore for a *quantum meruit*, and is not a claim under the contract itself, though the contract furnishes a guide to the value of the work done. With deference to the learned Judge I think what I have just said disposes of both of the obstacles which he found to be in the plaintiff's way.

As the defendant Phillips is a mortgagee within the definition of that term in section 9 of the Mechanics Lien Act, his rights therefore will have to be determined with reference to

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Martin, J.A.

that section. I would set aside the judgment and order a new trial.

IRVING, J.A.:—I would allow this appeal.

MARTIN, J.A.:—During the hearing we expressed the opinion that on the facts there was a lien, but the question is to what lands does it apply.

By the contract, dated April 1, 1914, the plaintiff undertook "to clear the lands of the company known and described as" (two named quarter sections) "containing 320 acres, the portions thereof to be cleared under this contract to be designated from time to time by the company's representative on the work as hereinafter mentioned." The "designation" clause is as follows:—

3. The said representative shall, from time to time, in writing, designate the portions of the land to be from time to time cleared hereunder by the contractor, and the contractor shall not proceed to clear any portion of the said lands of the company until he has written instructions from the company's representative to do so. Any designations or instructions given by the said representative may at any time before the work of clearing is actually commenced on any particular piece of land or on any portion thereof be changed, altered or cancelled by the said representative and new instructions given or not as the said representative sees fit.

Clause 6 provided that:—

The contract may be terminated by the corporation at any time by giving the contractor fifteen days' notice. . . .

On the same day the company's representative designated in writing the portions to be cleared as follows:—

Re our contract of even date for clearing, we herewith instruct you to commence same in the following order:—

Block 11, which with portions of road allowances round same contains about twenty acres . . . (and 3 other blocks of 20 acres) . . . with portion of road allowances round same . . . above being a portion of land described in our clearing contract.

In my opinion, this is a contract to clear the two quarter sections—"all the lands of the company," subject to the right to terminate the contract on notice, and to change or cancel "designation or instructions" before work was begun on designated portions. The plan of subdivision in evidence covering the whole of the adjoining quarter sections shews that it was the clearing of a townsite—with lots and streets, as a whole that was contemplated and undertaken. In such circumstances I am of the opinion that the subdivision must be viewed as a whole and that

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all of it had "benefited" by the plaintiff's work within the meaning of section 6 (c) and therefore the lien extends over both sections, except whatever may be excluded from it by section 3 as being "a public street or highway."

The trial has been had under section 31, at which the lien should have been declared, and Phillips' position and rights can be ascertained under section 9. The appeal should be allowed.

Galliher, J.A.

GALLIHER, J.A.:—I agree with the Chief Justice.

McPhillips, J.A.

MCPHILLIPS, J.A.:—I am of the opinion that the appeal should be allowed. The facts establish the right to the enforcement of a lien under the Mechanics' Lien Act. The lien is enforceable as against all the land save that which is excepted by sec. 3, being all such portions thereof comprised in "a public street or highway." My brother Martin has indicated in what way Phillips may have his rights in the matter determined, with which I agree. *Appeal allowed.*

ONT.

S. C.

## UNION BANK OF CANADA v. TAYLOR.

*Ontario Supreme Court, Boyd, C. March 9, 1915.*

1. FRAUDULENT CONVEYANCES (§ VIII—40)—PROCEEDINGS UNDER CREDITORS RELIEF ACT—PRIORITIES—MORTGAGES AND EXECUTIONS.

It is not obligatory upon the Court to apply the scheme of distribution under the Creditors Relief Act, R.S.O. 1914, ch. 81, in its entirety to moneys in court realized in equitable proceedings to set aside a fraudulent conveyance; so where there was a succession of mortgages registered at different dates with groups of executions during each interval, a fund so realized for the benefit of creditors and mortgagees will be distributed with reference to the priorities of the various mortgages, and by grouping the executions which intervened between any two mortgages so that each group of executions as a whole would rank ahead of mortgages afterwards placed on the land.

[*Roach* v. *McLachlan*, 19 A.R. (Ont.) 496; *Breithaupt* v. *Marr*, 20 A.R. 689, followed.]

Statement

APPEAL from the report of the Local Master.

*T. A. Beament*, for the appellants.

*J. F. Smellie*, for the plaintiffs, execution creditors.

*J. F. Orde*, K.C., for the Ontario Bank, execution creditors.

*W. D. Hogg*, K.C., for La Banque Nationale, mortgagees.

Boyd, C.

BOYD, C.:—The moneys to be distributed in this case were made available for the satisfaction of creditors and incumbrancers by the intervention of the Court in a suit to have incumbrancers by the intervention of the Court in a suit to have a transfer of the property (land) declared void as to creditors.

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The land was sold subject to the claims of prior mortgagees—prior, that is, to the date of the first execution. The proceeds of the sale are to be distributed among those entitled according to their priorities. Those entitled may be classified thus: first in time, execution creditors having charges on the land; second, the claim of La Banque Nationale under a subsequent mortgage; thirdly, a group of creditors whose executions are later in date than this mortgage; fourthly, another later mortgage to one Douglas and another to one Bickell; fifthly, another group, still later in date, of execution creditors; then, a fourth subsequent mortgage to the Traders Bank; and, lastly, another group of creditors whose executions are in the hands of the Sheriff. The amount realised by the sale is enough to pay in full the first group of executions, also the bank mortgage, and probably the next group of execution creditors. The Master has in this way settled the priorities and the manner of payment. It is objected on the appeal that the Master should have followed the directions given to Sheriffs in the Creditors Relief Act, R.S.O. 1914, ch. 81, sec. 33, sub-secs. 11 and 12. The meaning imputed to that statute is that the groups of execution creditors should be gathered in one scheme of distribution (irrespective of the different mortgages) and the proceeds of the sale divided ratably among all as on an equal footing. The result would thus probably be that the bank mortgage would be paid in full, and the execution creditors prior to this mortgage would receive a fraction of their charges. One obvious answer to this is, that the first execution creditors are prior to that mortgage, and the second execution creditors are subsequent to that mortgage, and so have their charge on a different estate in the land, lessened in value by the amount of the mortgage.

The Act does not appear to contemplate such a state of things as here exists: a succession of mortgages registered at different dates with groups of executions in the intervals between the different mortgages. The effect of the Act appears to be to pay a subsequent mortgage in full by reducing the amount of a prior execution, and this gives to a subsequent mortgage a better status as against a prior execution charged on the lands than existed when the mortgage transaction was effected be-

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tween the owner and the mortgagee. If this is the meaning and result of the Act, I do not feel disposed to extend its methods to the distribution of assets in this Court.

I do not think the analogy of the statute should be imported into these equitable proceedings. If the bank mortgage had been enforced by suit, the subsequent executions would have been wiped out if the creditors had not redeemed; and, if foreclosure ensued, that would leave the prior executions in full force. When the mortgage was made, it was subject to the existing executions, and there was no equity to have that mortgage paid out of the land in priority to the prior charges. The course of the Court is well settled and is carefully expounded in the cases cited and followed by the Master of *Roach* v. *McLachlan* (1892), 19 A.R. 496, and *Breithaupt* v. *Marr* (1893), 20 A.R. 689. The appeal is dismissed with costs. *Appeal dismissed.*

## SPEDDING v. CITY OF MONTREAL.

QUE.

C. R.

*Quebec Court of Review, Tellier, Greenshields, and Panneton, JJ. March 30, 1915.*

1. MUNICIPAL CORPORATIONS (§ II G 3—235)—MANHOLES IN STREETS — OWNED BY CORPORATION—DEFECTIVE COVER—INJURY—LIABILITY.

The city of Montreal is responsible for the condition of the manholes in its streets, and is liable in damages for injury caused by a pedestrian falling in; the cover having been removed and improperly replaced by parties unknown.

Statement

PLAINTIFF alleges that on the evening of August 4, she was proceeding along the sidewalk on the west side of Murray street, and at a certain place on said sidewalk she stepped on the cover of a manhole, which was insecurely fastened, causing her to fall in the manhole, very seriously injuring herself.

The defendant alleges that if the accident happened to the plaintiff as aforesaid, it was not due to any fault or negligence on the part of the defendant, inasmuch as if the cover of the manhole was removed it was not removed by its employees; that, in any event, it was impossible for the defendant to do anything to avoid the accident and that the claim of plaintiff is exaggerated.

The Superior Court dismissed the action.

*Trihey, Bercovitch, Kearney & Lafontaine*, for plaintiff.

*Laurendeau & Archambault*, for defendant.

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Greenshields, J.

GREENSHIELDS, J.:—The sidewalk in which the manhole was is the property of the defendant. The obligation of the defendant is to, at all times, maintain that sidewalk in, at least, a moderately safe condition for pedestrians. The manhole in the sidewalk was made by the defendant: the cover of the manhole was the property of the defendant; it was under the sole and absolute control of the defendant; it was the defendant's property that caused the damage, and that damage was caused through the defendant's property being in an improper and dangerous condition, and it is upon the defendant to clearly account for that improper and dangerous condition before the defendant can escape liability. The defendant has not accounted. The defendant has suggested that boys playing in the street may have removed the cover. It might as well have suggested that a man in playing in the street had removed the cover. There is nothing to prove the one or the other. The presumption is that the defendant's employees, who alone had the right to touch the cover, left it in the dangerous condition in which it was found.

I am of opinion, that the city is liable, and I should reverse the judgment, which dismissed the plaintiff's action, and I should condemn the defendant to pay the sum of $1,000 and costs of both Courts.

Panneton, J.

PANNETON, J.:—The street belongs to the defendant. They are bound by law to keep it in a safe condition for the public to travel over it. The manholes are for the sole use of the corporation for the purpose of cleaning the sewers and are not used by the public or any private person.

In that respect they differ from coal chutes which are made to be used, not by the corporation, nor the public, but by owners of private property only. Being so used by private persons for their own benefit, each person using them must see to the protection of the public whilst so doing, and not leave it open longer than necessary. If they do leave it open for such length of time so that the obstruction ought to be noticed by the corporation and this last takes no steps to remove the danger, then the corporation becomes negligent and is responsible for it. Such was the case of *McTasney* v. *The City of Montreal*, in which I held

that there did not elapse a sufficient length of time between the opening of the coal chute by the proprietor and the accident to constitute negligence on the part of the city in not noticing it.

But in this case no one has to use the manhole but the corporation, and if the cover has not been properly placed on it when it was used the last time, and an accident occurred, the corporation is liable at once; there can be no question of delay in noticing it. At eleven o'clock in the forenoon and up to ten minutes before the accident it appeared to have been right. Is it likely that children between eight and nine o'clock on Sunday night, when it was dark, played ball in the street, lost their ball and opened the manhole to get it? There being no proof whatever on the subject, either during that time nor previously, and the corporation men having removed the cover at sometime or another previously, to do the work needed, the presumption is that the cover was not properly put back by them notwithstanding its appearance to the passers-by as being right.

In this case unless the corporation established that some one for whom they are not responsible interfered with the cover of the manhole, they are liable. The burden of proof is on them to explain why their property was not in good condition. (Art. 1054 C.C.)

That the cover, as it was, offered a non-apparent danger to the public, what took place shews it (*res ipso loquitur*). The mere passing of the public over that cover could not make it dangerous, if it had been properly put on. If it has not been displaced by the children during these ten minutes on Sunday night between eight and nine o'clock and no proof was made that there were any children there at that time, its wrong position which remained unnoticed by Brady, the constable who passed there several times up to the ten minutes before the accident, and by Bracken, assistant superintendent of the Western division of the road who also passed there about half-past eleven Sunday morning, must be the act of the defendant's employees. To be in its proper place the cover had to be turned round so that it became fastened to a certain extent, so says defendant's witness Stuart Howard. The most probable state of that cover was that it had been simply put on the hole without being turned

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round and thereby fastened. It had the appearance of being correctly placed, when in fact it was not so. The two holes in such covers make them easy to grasp it with fingers and to displace them whilst the cover without holes cannot be taken out without a pick, a thing which is not generally at the hand of children. The cover with holes affords more facility for removal and ought to be superseded.

I come to the conclusion that the cover though apparently properly placed was not in its proper position, that the defendant's employees were the last who had occasion to take it out and replace it; that the corporation failed to give explanation for the bad state of that cover which is their property used by them alone; that the cover with two holes, ought to be replaced by one without holes; that the defendant was guilty of negligence and therefore must pay the damages occasioned by it.

We are of opinion that the plaintiff suffered damages to the amount of $1,000, the judgment *a quo* is reversed, the defendant is condemned to pay the plaintiff $1,000 with interest from this day and costs. *Appeal allowed.*

SASK.
S. C.

## FIRST NATIONAL BANK OF PALO ALTO v. KRUSE.

*Saskatchewan Supreme Court, Lamont, J. April 23, 1915.*

1. DEPOSITIONS (§ I—2)—ORDER FOR COMMISSION—JUDICIAL DISCRETION—PARTICULAR CIRCUMSTANCES.

The making of an order for a commission to take evidence *ex juris* is a matter of judicial discretion to be exercised according to the particular circumstances of each case.

[*Fidelity Trust Co* v. *Schneider*, 14 D.L.R. 224, referred to; *Coristine* v. *Haddad*, 21 D.L.R. 350, distinguished.]

Statement

APPEAL from a Master's decision.

*P. H. Gordon*, for plaintiff, appellant.

*H. Ward*, for defendant, respondent.

Lamont, J.

LAMONT, J.:—This is an appeal from the Master in Chambers refusing the plaintiff's application to have the evidence of one W. R. Jamieson, of Waterloo, in the State of Iowa, taken under commission. The action is brought on a promissory note. The defence, so far as is disclosed in the material before me, is that the note in question was given to the American-Canadian Land Co., a corporation out of the jurisdiction, as collateral security to a debt owed by the defendant to that company; that that debt,

and therefore the note, was paid in full, and that the plaintiff took the note with knowledge that it had been paid. The witness sought to be examined is the man who negotiated the note to the plaintiff. The application is made under r. 365, which reads as follows:—

365. The Court or a Judge may, in any cause or matter where it shall appear necessary for the purposes of justice, make any order for the examination upon oath before the Court or Judge, or any officer of the Court, or any other person and at any place of any witness or person, and may empower any party to any such cause or matter to give such deposition in evidence therein on such terms, if any, as the Court or a Judge may direct.

To justify the granting of the application, it must be made to appear that such a step is necessary for the purposes of justice. In *Bredin* v. *Greenwood*, 46 L.T.R. 524, Lord Baggallay said:—

What, therefore, the Court or a Judge is called upon to adjudicate on, or rather to consider in a matter of this kind, is whether it is necessary or whether it appears to the Court to be necessary for the purposes of justice so to direct. Of course "for the purposes of justice" does not mean, the interests of either party to the litigation, but, in the interests of all parties to the litigation.

And Cotton, L.J., said:—

The Court has, on the evidence before it, to arrive at the conclusion whether or not it is necessary for the purposes of justice that the ordinary way in which evidence is taken should be departed from, and unless he arrives at that conclusion it is the right of the person opposing the examination being taken in the way proposed to have the evidence taken in the usual way.

As was pointed out by my brother McKay in giving the judgment of the Court *en banc* in *Coristine* v. *Haddad*, 21 D.L.R. 350, the plaintiff had no absolute right to give the evidence of its witnesses otherwise than in open Court before the trial Judge. Where it is sought to do so, the plaintiff applying must establish the *bonâ fides* of the application, that there is some good reason why the witness cannot be examined here, the materiality of the evidence to be given, and that the defendant will not be unreasonably prejudiced thereby. The granting of a commission is a matter of judicial discretion, to be exercised according to the particular circumstances of each case: *Coch* v. *Allcock*, 21 Q.B.D. 178.

Assuming the *bonâ fides* of the application, has good reason

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been shewn why the witness cannot attend at the trial? An affidavit from him was read on the application in which he states, "It will be impossible for me to be in attendance upon the trial of said cause, or at least wholly impracticable, and such attendance would result in loss of time, neglect of business, damage and expense to me." No reason is given why it will be impracticable for him to attend, unless the loss of time, neglect of business, damage and expense to him constitute the impracticability. There is no doubt that the witness cannot be compelled to attend, and there is no doubt that if he does attend, such attendance would necessitate his leaving his own business for some days, at least, and would involve loss of time. It would also involve considerable expense, either to himself or to the party bringing him. But inability to compel a witness to attend at the trial as well as the inconvenience and expense of attending while factors to be taken into consideration in determining whether or not the order should issue, are not conclusive of the plaintiff's right to have the evidence taken on commission. If no injustice would be done the defendant, they may be determining factors, but they must be considered along with all the other circumstances of the case: *Toronto Carpet Man. Co.* v. *Ideal Home Furnishing Co.*, 20 Man. L.R. 571. Then, is the evidence of the witness material? This necessitates an examination of the issues to be tried. The action is for payment of the note. The defence is that the note was paid prior to its transfer to the plaintiff, and that the plaintiff took it with knowledge of such payment. The witness whose evidence is sought to be taken on commission is the broker who negotiated the assignment of the note from the land company to the bank. If the plaintiff bank took the note for valuable consideration before its mature date and without any knowledge of its having been paid, it can establish these facts by its own officers who took the note, without the aid of the witness Jamieson. If the note was negotiated by the land company after having been paid, such negotiation was a fraud on the defendant; and if fraud in the negotiation of the note to the plaintiff is proved, the bank must establish that it is a holder in due course. But how can the evidence of Jamieson assist the plaintiff in establishing this fact? He can testify as

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to the time when he negotiated the sale, but the bank can establish this by its own officers who took the note, and the books of the bank. As to the plaintiff's *bonâ fides* or knowledge, I do not see how he can testify as to either. I am, therefore, of opinion that the bank has failed to prove that his evidence is necessary or material to its case. Assuming, however, that his evidence would be material, I am still of opinion that the order should not be made, as it cannot be made without prejudice to the defendant. Where the issue to be tried turns upon the guilty knowledge or want of *bonâ fides* of the plaintiff, it is of the utmost importance that those who are called to establish the plaintiff's good faith and want of knowledge of defects in the negotiation of the note should give their evidence before the tribunal which has to determine the question of *bonâ fides* and knowledge, and this is particularly so where the parties who took part in the negotiations are the only ones who have any knowledge of what took place, and the defendant must rely on a searching cross-examination of the plaintiff's witnesses, and their demeanour and manner of giving evidence, to offset their direct testimony that they acted *bonâ fide* and without knowledge of defects. A plaintiff is not coming into Court admitting either a want of *bonâ fides* or guilty knowledge. We must take it he comes prepared to pledge his oath against both, otherwise he would not come at all. The success or failure of the defence, therefore, rests upon whether or not counsel for the defence can, by his cross-examination, shake the credence which the Court would otherwise be obliged to give to this direct testimony. In determining his credibility in such a case, the demeanour of the witness in the box and the manner in which he gives his evidence would be of great assistance to the Court, and should, in my opinion outweigh many other considerations: *Lawson* v. *Vacuum Brake Co.*, 27 Ch.D. 137; *Park* v. *Schneider*, 6 D.L.R. 451; *Stewart* v. *Battery Light Co.*, 5 O.W.N. 195; *Fidelity Trust Co.* v. *Schneider*, 14 D.L.R. 224; *Union Investment Co.* v. *Perras*, 2 A.L.R. 357. The plaintiff relied upon *Coristine* v. *Haddad*, 21 D.L.R. 350, where the Court *en banc* overruled a decision of the District Court Judge, refusing an application on behalf of the plaintiff to examine witnesses in Montreal. In that

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case the issue was whether or not a jacket sold by the plaintiff to the defendant fulfilled the warranty which the defendant alleged the plaintiff had given. There was nothing of a complicated nature on the action; the defendant had had the jacket in his possession for some time, and had, or could have had, witnesses on his own behalf to testify as to its condition. In giving judgment, my brother McKay, in commenting on the cases of *Fidelity Trust Co.* v. *Schneider and Union Investment Co.* v. *Perras*, said:—

> In these two cases the plaintiffs were suing on a note which had been obtained by fraud by the payees, McLachlan Bros., and endorsed by them to the plaintiffs. The question was whether the plaintiffs were holders in due course, and there was apparently strong suspicion that they had notice of the fraud or that the McLachlan Bros. were still interested in the notes.

In thus distinguishing those two decisions, without questioning their correctness, I take it that the Court *en banc* thought that the principles adopted in these two cases had no application to the facts of the case then being determined, but that in cases where want of *bonâ fides* or guilty knowledge were alleged, the interests of justice might demand that the evidence of the witnesses on behalf of the plaintiff called to establish *bona fides* should be given *viva voce* at the trial. The appeal will therefore be dismissed. *Appeal dismissed.*

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## BABINEAU v. RAILWAY CENTRE PARK CO.

*Quebec Superior Court, McCorkill, J.*

1. VENDOR AND PURCHASER (§ I C—10)—AGREEMENT FOR SALE—AGREEMENT MADE IN QUEBEC—LAND IN OTHER PROVINCE—PROOF OF TITLE.

Where an agreement is entered into in the Province of Quebec for the purchase of land in another province and where no satisfactory proof is given of what the law is as to the requisites of good title and proper conveyance in such other province the law of Quebec will prevail.

Statement

ACTION to set aside an agreement of sale of real estate.

The declaration alleges, in effect that on July 16, 1913, plaintiff purchased from defendant certain lots of land described in the deed, subject to the conditions therein mentioned, and paid defendant, before the signing of the same, $1,125, in full payment of the price of said lots; that, under clause 4 of the agreement, defendant bound itself to convey and furnish titles therefor on payment of said amount; that defendant has been re-

quested to fulfil its part of the agreement many times, but has failed to do so; that defendant sent a document to plaintiff which it pretended was good title to the land in question; but the plaintiff, not only refused to accept the title at that late date, but also because the property was encumbered by a mortgage of $22,908, that the plaintiff tenders back and files with his action the said title and demands to be refunded the amount which he paid, $1,125 and $42 interest.

The defendant contests the action: it declares that when the agreement was made, the defendant thought it could furnish the title without delay; that a few days after said agreement, the party who held the mortgage became insane and it was impossible to obtain from him his signature to a document granting the plaintiff perfect title, and it would have been necessary to take lengthy proceedings in the Province of Saskatchewan to obtain clear title before the institution of this action; that it was, therefore, by "*force majeure*" said title was not procured earlier; that plaintiff was never in danger of being disturbed in his proprietorship and has no reason for making the demand in question; and it concludes for the dismissal of the action.

The Court maintained the action.

*Pentland, Stuart, Gravel & Thompson*, for plaintiff.

*Turgeon, Roy & Langlois*, for defendants.

McCORKILL, J.:—At the inquiry and merits of the case, defendant attempted to prove the validity of the title produced according to the law of the Province of Saskatchewan. The plaintiff objected that there was no allegation alleging what the law of Saskatchewan was in this connection; the presumption was that the law of the Province of Quebec prevailed. I maintained the objection.

McCorkill, J.

The defendant's counsel then moved to be permitted to amend its plea, by alleging what the law of Saskatchewan was as to titles to real estate. The plaintiff's counsel agreed to the amendment, provided the trial of the case was not suspended, and he waived the right to plead to the amendment.

Titles similar to that produced would have been of no value in transferring real estate in the Province of Quebec. In certain parts of our province deeds of sale must be made in authen-

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tic form; in other parts, it is permitted to make them (*sous seing privé*) in the presence of witnesses, one of whom would require to authenticate the signatures by extra-judicial declaration, and the registration of the title. Nothing of this kind was done in connection with the lots in question in this case.

Mr. Belley, member of the Bar of the Province of Quebec and of the Province of Manitoba, was examined as a witness. He admits he was not a member of the Bar of Saskatchewan. He had had some personal experience in the transfer of real estate in Saskatchewan, but he did not pretend to be an expert in the law of Saskatchewan.

My opinion is that the evidence of Mr. Belley, which was not at all emphatic and not at all sure, was insufficient not only because he was not an expert, but he would not testify the documents in question would convey title.

I am of opinion, that the plaintiff's action is well founded. The defendant has entirely failed to prove what the law of Saskatchewan was when the agreement was made and its plea is unfounded.

The agreement between the parties was made in the Province of Quebec. The receipt of the money is proven. The defendant having failed to give a good title must refund the money.

Judgment, therefore, goes for plaintiff, with costs.

*Judgment for plaintiff.*

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## CARSON v. MONTREAL TRUST CO.

*Nova Scotia Supreme Court, Sir Charles Townshend, C.J., Graham, E.J., and Russell and Ritchie, JJ. March 9, 1915.*

1. CORPORATIONS AND COMPANIES (§ VI D—335)—CLAIMS AGAINST LIQUIDATORS—SUMMARY PROCEEDINGS—PLENARY SUIT—STAY OR DISMISSAL.

Claims against liquidators may be enforced by a summary proceeding, and a plenary action taken against a liquidator for the wrongful taking possession of goods while in transit after the winding-up of the corporation will either be stayed or dismissed.

Statement

APPEAL from the judgment of Longley, J., staying proceedings.

*H. Mellish*, K.C., and *J. B. Kenny*, for plaintiff, appellant.

*W. A. Henry*, K.C., for defendants, respondents.

Sir Charles Townshend, C.J.

SIR CHARLES TOWNSHEND, C.J.:—This is an appeal from the decision of Longley, J., staying proceedings in the action

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against the defendants, liquidators of the Canada Iron Co. It does not appear very clearly from the decision on what ground he made the order. The action is according to the statement of claim "against the defendants as liquidators of the Canada Iron Corporation, Ltd., for goods sold and delivered by the plaintiff to the defendants as such liquidators . . . the said goods having been delivered and taken possession of and sold by the defendants as such liquidators after the order for the winding-up of the said corporation. Alternatively that the defendants as such liquidators wrongfully and inequitably took delivery of the said goods from the said carriers while in transit from the plaintiffs to said corporation, and thereby prevented the plaintiffs from exercising their right to stop said goods in transit, etc., etc."

Counsel for the defence pointed to the Winding-up Act, ch. 144, R.S.C., sec. 22, as authority for the order to stay, but it is evident that section refers to actions commenced against the company being wound up, but sec. 133 provides for claims against the liquidators. It reads as follows:—

> All remedies sought or demanded for enforcing any claim for a debt, privilege, mortgage, lien, or right of property, upon, in or to any effects or property in the hands, possession or custody of a liquidator, may be obtained by an order of the Court on summary petition, and not by any action, suit, attachment, seizure or any other proceeding of any kind whatsoever.

It will thus be seen that there is a positive prohibition against the bringing or maintaining such an action as the present. The section completely covers just such an action as this. I only differ from the Judge below in this, that not only should he have stayed the action but should have dismissed it. The appeal will be dismissed with costs.

RITCHIE, J.:—I agree that this appeal must be dismissed with costs. I think the first thing to be considered is what is the object of winding up? The answer to this question is given in clear and direct language by Jessel, M.R., in the case of *Re International Pulp and Paper Co.*, 3 Ch. D. 597, at 598. He says:—

> What is the object of winding up? It is to distribute the assets of the company ratably amongst its creditors and enforce contributions against its shareholders or contributories, and make them pay what they

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are liable to pay with a view to liquidating the affairs of the company. That is the object of the Act. How is that object effected? By stopping all actions or suits brought against the company when the winding up is commenced so as to compel creditors to come in and share ratably.

These remarks were made with reference to the Companies Act, 1862, but they apply with equal force to the Winding-up Act passed by the Parliament of Canada. It is admitted that sec. 22 is a bar to proceeding with an action against the company, but sec. 133 goes further and makes provision that:—

[The learned Judge here cited sec. 133, and continued.]

The plaintiff claims to have a cause of action against the liquidators as such for the full price of the goods. I am far from saying that he has a valid claim in this regard, but assuming for the sake of argument that he has, his claim is covered by sec. 133. The words of that section are general and there is no reason why I should limit them. On the contrary, I think the clear intention of the Winding-up Act is that claims either against the company or the liquidator as such shall be dealt with under the Act in a summary way in order to prevent the assets being eaten up by litigation. When the estate is in liquidation then the hand of the Court is kept on it in order that as much as possible may be realized for the creditors. Sec. 133 is a full and ample remedy for the plaintiff. If he is entitled to be paid in full it will be so ordered—if not such order as ought to be made will be made.

In sec. 133 there is a prohibition against proceeding by action, but, apart from this, where a new statutory remedy is provided it is as a general rule the exclusive remedy.

In Craies on Statute Law, at p. 306, it is said:—

> In the case of an Act which creates a new jurisdiction, a new procedure, new forms or new remedies the procedure, forms or remedies there prescribed and no others must be followed until altered by subsequent legislation.

Sec. 133 comes within this rule. I think I ought not to express any opinion as to what disposition should be made of the plaintiff's claim when it comes before a Judge under sec. 133. It is sufficient to decide that the plaintiff cannot succeed in this action. In my opinion this is so clear that I think it may be said that it is plain and obvious, and where this is so there is a case for the exercise of the inherent jurisdiction of the Court

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to stay the action on the ground that it is vexatious or frivolous, and that jurisdiction should, I think, be exercised in order to prevent the assets being wasted in litigation which cannot succeed.

With this end in view I would make any amendment that might be necessary to attain it.

GRAHAM, E.J., and RUSSELL, J., concurred.

Graham, E.J. Russell, J.

*Appeal dismissed.*

## COURCHENE v. VIGER PARK CO.

QUE.

K. B.

*Quebec Court of King's Bench, Appeal Side, Sir Horace Archambeault, C.J., Trenholme, Lavergne, Cross, and Carroll, JJ. February 26, 1915.*

1. CORPORATIONS AND COMPANIES (§ IV G 2—110)—OFFICERS — MEETING OF SHAREHOLDERS—IRREGULARITY—RIGHT OF COMPANY TO TAKE ADVANTAGE OF.

Where the secretary-treasurer of a company has called a meeting of the shareholders of the company and is seeking to take advantage of resolutions passed at that meeting although it was irregularly held; the company is entitled to take advantage of such irregularity although it could not invoke it against third parties acting in good faith.

2. CORPORATIONS AND COMPANIES (§ V G—283)—MEETINGS—IRREGULARLY CALLED—RESOLUTIONS VOID.

Where the by-laws of a company require the meetings of shareholders to be called by the president of the company at the written request of five members; a meeting called by the secretary-treasurer, without the consent and against the will of the president is illegal, and any resolution adopted at such meeting is null and void.

3. CORPORATIONS AND COMPANIES (§ V A—167)—CAPITAL STOCK—FIXED AMOUNT—SUBSEQUENTLY INCREASED—NO SUPPLEMENTARY LETTERS PATENT—VOTES—EFFECT.

When the letters patent fix the capital stock at a certain amount and do not include any clause permitting the shareholders to increase such capital and such capital has been increased without the issuing of supplementary letters patent; a resolution voted on by the holders of the additional shares, even although the majority were original shareholders, is illegal and void.

Statement

APPEAL from the judgment of Demers, J.

*Lamothe, Gadbois & Nantel*, for appellant.

*Pelletier & Pelletier*, for respondents.

The judgment of the Court was delivered by

Archambeault, C.J.

SIR HORACE ARCHAMBEAULT, C.J.:—I am of opinion that the judgment is well founded and that it should be confirmed.

At a general meeting of the shareholders of the company, held on March 28, 1912, a proposition was adopted granting to Tourangeau and Courchêne an option to purchase land number 440 of the cadastre of La Longue-Point, for a sum of $85,000,

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$35,000 of which were payable in cash. That option was good only to May 10, following, 1912. Tourangeau and Courchêne did not take advantage of that offer; and, on November 12, 1912, the president got a notice from some shareholders to call at once a general meeting of the shareholders. The president did not comply; but the secretary-treasurer took upon himself to send a notice of a meeting for November 19, for the purpose of taking into consideration an offer for the Park Viger. It is at that meeting that was adopted the proposition granting an option to the appellant.

A first motion was submitted proposing to accept an offer of $80,000 made by Mr. J. C. H. Dussault, advocate. There was a proposition as an amendment to accept an offer by Mr. J. A. O'Gleman, notary, for a sum of $85,000. At last there was a proposition by way of amendment to grant the option asked by the appellant for a sum of $86,000; and that sub-amendment was adopted, after the vote had been called for upon it. Only, it was declared that a commission of 2½ per cent. would be paid the appellant. That commission represented a sum of $2,150, so that the selling price was in reality $83,850, and not $86,000.

The company had, therefore, accepted an offer less than the one from notary O'Gleman, which was of $85,000. The appellant made a deposit of $1,000 in the hands of the president, in the form of a cheque, with the understanding that such amount would be applied to the sale price, if the latter took place, and that it would be confiscated for the benefit of the company if the sale did not take place. The option granted the appellant was good for three months. The second day after the meeting, on November 21, the appellant disposed of his option to advocate Dussault, the same one who had made an offer of $80,000.

I must add that the defendant, J. M. Dorion, president of the company, heard as a witness, declared that he went to the meeting to protest, that he then declared the meeting to have been called against his will and against the will of the vice-president, and that it was irregular. He added that as president, he did not call for the vote on any question and that he has declared no proposition adopted. Witness Bazinet also

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says that Dorion has declared the meeting to have been called irregularly, without his authorization, and against his will.

So it is against the will of the president of the company that the meeting was called; it was in fact called by the secretary-treasurer, the appellant in this case, the party who has got an option for a consideration inferior to notary O'Gleman's offer; and it was held in spite of the protests of the president. After all that, the appellant has very poor reasons for claiming that the company cannot be entitled to take advantage of the irregularities of that meeting to repudiate the resolution then adopted. A company is prevented from taking advantage of irregularities in its proceedings against third parties in good faith; but surely the appellant cannot claim that he is a third party in good faith.

I now come to the question as to whether or not the meeting of November 19 was regularly called and legally held. The judgment *a quo* says on this point:—

> Whereas, according to regulations, the meetings must be called by the president at the written requisition of five members; whereas the president has never been required by five members to call the meeting and whereas the meeting has been called against his will; whereas the president for the minority did protest that the meeting was illegal; whereas some shareholders were absent and whereas the Court has to apply that strict rule especially in a case like this one where a lower offer has been accepted against the interests of the corporation. Be it declared that said meeting was null and illegal as well as any resolution by it adopted.

The Court of first instance, as it is seen, applied the by-laws of the company in saying that the meeting was called irregularly.

The by-laws in question were adopted on May 5, 1911, *i.e.*, before the obtaining of the Letters Patent. It is therefore a question if they are really in force. But the decision of such question is of no importance in the case; because if the by-laws are to apply, the meetings must be called by the president, and the meeting of November 19 has been called by the secretary, against the will of the president; and if the rules do not apply we must have recourse to the R.S.Q. which require the meetings to be preceded by a notice of 14 days, and here the notice has been only a 5 days' notice. In either case, therefore, the meeting has been called irregularly. It is proved in the case

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that at least three shareholders were not present at the meeting: J. C. Clear, B. McNamus, and Mme. J. B. Thouin. Therefore, the absence of regularity in the calling of the meeting is fatal.

There is another objection against the validity of the decision adopted at the meeting of November 19, which, in my opinion, would be sufficient to annul such decision. The Letters Patent, which have constituted the company a corporation, fix its capital stock at $20,000, and do not include any clause permitting the shareholders to increase such capital. Then, the capital, after the obtaining of the Letters Patent, has been carried from $20,000 to $30,000 without the issuing of supplementary Letters Patent. The shareholders who were present at the meeting of November 19, represented shares to the amount of nearly $30,000, and consequently included holders of shares issued without authority. That would be sufficient, in my opinion, to make null all resolutions not unanimously adopted at such meeting, even if the majority of those who voted in favour of those resolutions was composed of original members of the company.

For those reasons, I am of opinion that the judgment of the Court of first instance is well founded, and that it should be confirmed. *Appeal dismissed.*

ONT.

S. C.

## CROWLEY v. BOVING & CO. OF CANADA.

*Ontario Supreme Court, Appellate Division, Falconbridge, C.J.K.B., Riddell, Latchford, and Kelly, JJ. March 23, 1915.*

1. MOTIONS AND ORDERS (§ I—4)—MOTION BEFORE APPELLATE DIVISION—EXAMINATION OF WITNESS—LEAVE OF COURT—NECESSITY OF.

An appointment issued without leave of the Divisional Court to examine witnesses by a party making a motion to a Divisional Court of the Appellate Division and proposing to read at the hearing of the motion the depositions of the witnesses, is irregular and will be set aside.

Statement

ACTION brought by Charles Crowley to recover damages for injuries sustained by him while working for the defendants. The action was tried before MEREDITH, C.J.C.P., and a jury; and, upon the findings of the jury, the action was dismissed.

The plaintiff appealed; his appeal was heard by a Divisional Court of the Appellate Division on the 11th February, 1915, and was dismissed.

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On the 16th February, 1915, the plaintiff served notice of a motion to re-open the hearing of the appeal and for a new trial, upon the ground that he had discovered since the trial and since the hearing of the appeal that the testimony given by a certain witness at the trial did not relate to the place where the plaintiff was when he was injured, but to another place, and that the plaintiff was taken by surprise at the trial, and upon other grounds.

In support of this motion the plaintiff proposed to examine three witnesses, with the view of reading their depositions at the hearing of the motion, and obtained from a local officer an appointment for the examination of the three witnesses.

Upon the application of the defendants, the appointment was set aside by an order of the Local Master at Lindsay.

The plaintiff appealed from the order of the Local Master; the appeal came on for hearing in Chambers on the 12th March, 1915, before BOYD, C., who adjourned it for hearing by the Divisional Court of the Appellate Division which should hear the motion to re-open the appeal and for a new trial.

*W. Laidlaw*, K.C., for appellant.

*C. A. Moss*, for defendants, respondents.

THE COURT held, approving *Trethewey* v. *Trethewey* (1907), 10 O.W.R. 893, that the appointment was improperly issued, no leave having been obtained from the appellate Court.

The appeal from the order of the Local Master was, therefore, dismissed; and the substantive application to the Court for leave was refused; the main motion, to re-open the hearing and for a new trial, was also refused.

Costs were awarded to the defendants throughout.

*Appeal dismissed.*

## LEE v. CHAPIN.

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S. C.

*Alberta Supreme Court, Walsh, J. March 30, 1915.*

1. SALE (§ II D—40)—SALE OF AUTOMOBILE—OPPORTUNITY OF INSPECTION—DAM'GED CAR—NON-DISCLOSURE.

On the sale of a chattel (*ex. gr.* an automobile) where there was non-disclosure by the seller of the fact that the chattel had been damaged and the damages repaired, although the chattel could still be classed as new, as represented to be, but nothing was done by the seller to induce the buyer not to avail himself of the means of knowledge within his reach, the buyer who accepts the chattel without investigation will be denied damages in respect of such non-disclosure where no material damage had resulted to the chattel so as to make it

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any less valuable after being repaired, particularly where it was found that such non-disclosure was not designed.

[*New Brunswick* v. *Conybeare*, 9 H.L.C. 711, 742, applied; *Addison* v. *Ottawa Taxicab Co.* 16 D.L.R. 318, distinguished.]

ACTION for the price of goods sold.

*W. P. Taylor*, and *D. S. Moffatt*, for plaintiff.

*A. H. Clarke*, and *F. S. Albright*, for defendant.

Walsh, J.

WALSH, J.:—The plaintiff bought from the defendant a Packard motor car for $5,900, paying $500 in cash and giving his note for $5,400. Before the maturity of the note, the defendant disposed of it to another man, who, after maturity brought action upon it. The present plaintiff defended that action until he was able by an examination for discovery to satisfy himself, as he did, that the plaintiff in it was a holder in due course whereupon he paid the note in full. He now sues to recover back all of the money thus paid with interest and the costs incurred by him in defending the action on the note.

His claim, as disclosed by his pleadings, is that this car had been seriously injured in an accident and greatly damaged prior to the date of his purchase of it and that the defendant did not communicate this fact to him, but on the contrary concealed it from him and represented the car to be sold to him as a new car. At the trial, however, a further contention was developed on behalf of the plaintiff that he had not bought this particular car at all, but had agreed to buy an unspecified and unselected Packard car of the following year's make. At the close of the trial I found that the car which was the subject matter of the contract between the parties was the particular car to which the evidence was directed, that before the making of this contract, the car had, to the knowledge of the defendant's employees, but not to his personal knowledge, met with an accident which had been immediately repaired, that no harm whatever had resulted to the car from this accident, its subsequent repair having put it in its original perfect condition and no damage thereby having been caused to it in its subsequent operation, that the fact of this accident was never communicated to him by the defendant, though the defendant's agent who negotiated the sale was well aware of it, that he did not discover the fact until some 6 months after his purchase and that he in a

short time thereafter repudiated the contract on that ground. The accident was to the structural as distinguished from the mechanical part of the car. In driving the car for the purposes of demonstration to a prospective purchaser, a stone thrown violently from under the wheel, struck the bottom of the crank case, driving out the drain plug and making a hole in the metal bottom. The crank case contains the lubricating oil which supplies the engine and this escaped through the hole thus made. The car was stopped within 50 ft. of the place of the accident; it was towed from there to the defendant's garage and it was not used again until this hole had been properly closed up. It was clearly established that the only possibility of substantial damage to the car from the occurrence lay in its operation after the escape of the lubricating oil from the crank case through the hole thus made in the bottom of it and that clearly did not happen in this case. The question that I have to determine is whether or not the non-disclosure of the fact of this accident productive, as it was, of no material harm to the car, is sufficient to entitle the plaintiff to rescind the contract. I am satisfied that the silence which the defendant's employees kept on the subject was not due to design on their part. I think that they were convinced that the car had sustained absolutely no injury through this misadventure. The patch on the bottom of the crank case might be an offence to the eye of one examining the under part of the car, but that would be all and the very existence of the patch would reveal to the party making the examination the fact that something had happened. And so, either in entire forgetfulness of the fact or because of this conviction on their part, they kept from the defendant this information which in all fairness, and apart entirely from the question of their legal obligation to do so, they should have conveyed to him. The answer to this question must depend, I think, upon whether or not there was a legal duty or obligation on the defendant to disclose the fact of this accident to the plaintiff for mere silence respecting it is not a ground for rescission unless the defendant was legally bound to speak of it: *Turner* v. *Green*, [1895] 2 Ch. 205; *Greenhalgh* v. *Brindley*, [1901] 2 Ch. 324; *Seddon* v. *North Eastern Salt Co.*, [1905] 1

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Ch. 326. On the other hand, as Lord Blackburn put it, in *Brownlie* v. *Campbell*, 5 A.C. 925, at 950,

> where there is a duty or an obligation to speak and a man in breach of that duty or obligation holds his tongue or does not speak or does not say the thing he was bound to say, if that was done with the intention of inducing the other party to act upon the belief that the reason why he did not speak was because he had nothing to say, I should be inclined myself to hold that that was fraud also.

The only authority to which I was referred on this question was *Addison* v. *Ottawa Taxicab Co.*, 16 D.L.R. 318. The facts of that case are, however, so entirely different from those with which I have to deal that it is of little or no value to me.

Whatever moral obligation may have rested upon the defendant to make known the facts which he is now charged with concealing, I am under the opinion that he was under no legal obligation to do so and that the plaintiff's action must therefore fail.

In *Smith* v. *Hughes*, L.R. 6 Q.B. 597, at 603, Lord Cockburn says:—

> I take the rule to be that where a specific article is offered for sale without express warranty or without circumstances from which the law will imply a warranty—as where for instance an article is offered for a specific purpose—and the buyer has full opportunity for inspecting and forming his own judgment, the rule, caveat emptor, applies. If he gets the article he contracted to buy and that article corresponds with what it was sold as, he gets all he is entitled to and is bound by the contract.

The only thing approaching an express warranty on this sale was the defendant's statement that the car was a new one and that was true. If there was an implied warranty or condition it was only that raised by sec. 16 (1) of the Sale of Goods Ordinance, that this car should be reasonably fit for the purpose for which the plaintiff required it and this it undoubtedly was. See also *Horsfall* v. *Thomas*, 31 L.J. Ex. 322, though this case is disapproved of by Lord Cockburn in *Smith* v. *Hughes*, *supra*. The language of Lord Chelmsford in *New Brunswick*, *etc.* v. *Conybeare*, 9 H.L.C. 711 at 742, might, I think, properly be applied to this case. He says:—

> Where the fact is not misrepresented, but concealed and there is nothing done to induce the other party not to avail himself of the means of knowledge within his reach, if he neglects to do so, he may have no right to complain because his ignorance of the fact is attributable to his own negligence.

In dismissing the action, I do so without costs. In fairness

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the plaintiff should have been told of this accident. The defendant says that if he had known of it he would have told him. The plaintiff had, I fancy, no means of knowing except through the evidence adduced at this trial, whether or not the accident was one which had occasioned or was capable of occasioning material injury to this expensive car. The conduct of the defendant in disposing of the plaintiff's note a few days before its maturity at the cost of a heavy discount, and for the admitted purpose of getting it into the hands of an innocent holder quite warranted the suspicion on the part of the plaintiff that there was something seriously wrong in connection with the matter. If authority were needed for withholding costs from a successful defendant under such circumstances, it may be found in such cases as *Hepworth* v. *Pickles*, [1900] 1 Ch. 108, and *Greenhalgh* v. *Brindley, supra.*

The defendant counterclaims for storage of this car. As a matter of strict law he is entitled to judgment in his favour on this counterclaim. I would suggest to him that he might in all fairness abandon this claim. If he insists upon it, however, there will be judgment in his favour for $120, being 12 months' storage from April 1, 1914, at $10 a month without costs.

*Action dismissed.*

[Oct. 19, 1915. Appealed to Supreme Court.—Appeal dismissed.]

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## JAMES BAY & E. R. CO v. BERNARD.

QUE.

K. B.

*Quebec Court of King's Bench, Appeal side, Sir Horace Archambeault, C.J., Trenholme, Lavergne, Cross and Carroll, JJ.*

1. JUDICIAL SALE (§ IV—35)—DECREE—PETITION TO ANNUL—NOTICE—PRESENTATION—"FILED."

Where at the end of a petition to annul a decree there is a notice of presentation to the judge sitting for a certain district or in his absence to the prothonotary for the said court and the petition is properly served on the attorney for the other party; it is properly presented if on the day fixed it is, in the absence of the judge, presented to the prothonotary who marks it "filed."

2. PLEADING (§ III D—325)—PETITION—AFFIDAVIT—SUFFICIENCY OF.

Where a petition should be accompanied by an affidavit it is only as to those allegations which are not established by the record itself that the affidavit can be invoked.

3. EXECUTION (§ I—4)—EXECUTION DE BONIS—EXECUTION DE TERRIS—TIME OF ISSUING—DESCRIPTION.

A writ of execution *de bonis* must be exhausted before the issue of a writ *de terris* unless a *procès-verbal de carence* is produced and it is not necessary in a petition for annulment of a decree on this ground to give a description of the moveables.

[*Rose* v. *Savoie-Guay*, 7 D.L.R. 205, followed.]

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4. WRIT AND PROCESS (§ II A—10)—DECREE—PETITION TO ANNUL—DELAY FOR SERVICE.

The delay for service of a petition to annul a decree is the same as in all other proceedings which commence by way of petition and is one clear day.

APPEAL from a decision of the Court of Appeal.

*Perron & Taschereau*, for appellant.

*Armand Boily*, for respondent.

The judgment of the Court was delivered by

LAVERGNE, J.

LAVERGNE, J.:—The petition to annul the decree contains a number of grounds of irregularity in the seizure and sale of the immoveables of the appellant. But it is sufficient for me to deal with those which affect the contestation upon the exception to the form.

1. In answer to the first ground of exception, namely, that the petition was not presented according to law, let us see in what manner it was presented. At the end of the petition is the notice of presentation to the Judge sitting in and for the District of Chicoutimi, "or in his absence to the prothonotary of the said Court on the 26th May, 1913, at the Court house at Chicoutimi at ten o'clock a.m. or as soon after as counsel can be heard." This petition was served on the respondent Bernard through Messrs. Bergeron & Pelletier, his attorneys, who had obtained judgment for him and who had caused a writ of execution against the appellant to G. Levesque, sheriff, and to T. L. Bergeron, purchaser, who was at the same time one of the attorneys *ad litem* of the respondent Bernard, and who is also the attorney *ad litem* of the respondent upon the petition to annul the decree. On May 26, 1913, there was no Court at Chicoutimi and the Judge was absent; the petition was, in consequence, presented to the prothonotary, who contented himself with marking it "filed" on the day in question. It is evident that the appellant could do no more than to present it to the prothonotary, but as this petition had been proceeded with according to the delays of an ordinary instance in the terms of art. 787, C.P.Q., there was in this case nothing to do on that day but file the petition in question and wait until the respondents thereto should appear and plead to the petition within the ordinary delay. This first ground of exception to the form then had no foundation.

2. The respondents complained in the second place that the

petition is not supported by an affidavit for all the allegations of which the facts do not appear on the record. In examining the procedure carefully I see that the greater part of the facts relied upon by the appellant appear in the documents on the record; if any of the allegations of the petition are not established by the record itself it is those only for which the respondents can invoke the want of an affidavit. Then the judgment in first instance does not take account of this second ground of exception to the form. I should say that the appellant to cover this absence of an affidavit in regard to certain of its allegations has applied from the beginning to be permitted to file an affidavit in support of his petition, but this motion was rejected by the final judgment at the same time as the petition itself was dismissed. The appellant also complains of the judgment dismissing this motion in its inscription on appeal. At the outset of the proceedings this ground, which the Superior Court has not considered, could easily have been made regular; it seems also that the motion asking permission to file an affidavit should have been granted; that was a mode of remedying an irregularity, if irregularity there were, and this permission should have been granted under the terms of art. 175, C.P.Q. This absence of affidavit was no prejudice to the respondent, especially since the appellant at the outset offered to remedy it.

3. A third ground invoked in the exception to the form is that the appellant does not give the description of the moveables that it possesses and the place where they are, nor the true description of the immoveables seized and sold of which she complains. In effect the appellant complains that a writ of execution *de bonis* was not issued against it before the issue of the writ of execution *de terris* and that its moveables have never been legally nor regularly disposed of before they could proceed to the seizure of the immoveables as the law required. If the record is examined it will be seen that there never was in fact any writ of execution *de bonis* and that there was only a writ of execution *de terris* taken against the immoveables of the appellant; this is an irregularity in procedure of a very serious nature; although it will not be necessary to discuss it now I will say in passing that we have decided in the cause of *Rose* v.

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*Savoie-Guay Co.*, 7 D.L.R. 205, that such a procedure was not admissible; it is bad unless a *procès-verbal de carence* as to the moveables is produced, which could not be done without having taken out a writ of execution *de bonis*. In the present case nothing of the kind has been done and it is not a case in which the matter could be overlooked contrary to the terms of the art. 614, C.P.Q., and to the jurisprudence. In this case of *Rose* v. *Savoie-Guay, supra*, which I cite this question is discussed at length. It could not be permitted to furnish a description of the moveables of the appellant when there was no writ of execution *de bonis* issued. As to the description of the immoveables seized and sold according to the claim of the appellant, it appears from the description given of them by the sheriff in the seizure that this description is not legal. The third ground of exception to the form is then also without force and ought to be rejected.

4. The main ground of exception to the form is that the delays of service of the petition to annul the decree are insufficient especially for the plaintiff. I should say that this is the most important point in the cause.

The appellant claims that this delay for service of the petition should only be one day, that is to say, the delay for service generally upon every motion or petition and instances a great number of proceedings which are filed after a notice of one day. For the writ of summons the delay is 6 days, for the subpœna the delay is one day, and for all the other proceedings the delay is also one day. It, therefore, appears to be that for all proceedings which commence by way of petition, such as a petition to annul a by-law, a petition contesting an election, a petition for a remission of a prerogative writ or an injunction, a petition in review, a *requête-civile*, tierce opposition and opposition to judgment. The words of art. 787, C.P.Q., "and is subject to the same rules and delays as the ordinary instance," would seem to mean according to the appellant that when the petition is filed in Court it should follow the same rules and observe the same delays as in the case of an ordinary instance.

I am disposed to accept this interpretation of art. 787 excepting the claim of the appellant in reasoning by analogy upon

proceedings which commence by a petition as those which I have cited above. At all events even if a delay of 6 days is necessary I believe that the procedure of the appellant, its petition to annul a decree could not be rejected for insufficient delay in service causing prejudice to the respondent.

As to the purchaser and the sheriff the question does not arise. The delay was 6 days and there is nothing in the bailiff's return to shew that the distance between the residence or the domicile of these two persons and the Court house is more than 50 miles.

As to the principal respondent, François Bernard, the service of the petition on him might have been made within a delay of 7 days because of his residence being more than 50 miles from the Court house, and because also of the fact that the petition was only served on him on May 20 to be filed in Court on the 26th, but it is necessary to remark that this was a proceeding in the cause; that in the cause he was represented by Messrs. Pelletier and Bergeron, his attorneys *ad litem;* that it was they who caused to be issued the writ of execution *de terris*, and consequently represented him on the seizure in question; that one of them as I have already said, became the purchaser at the sale, and the petition to annul the decree was served on them as attorneys of respondent, and it was also served on T. L. Bergeron, one of the attorneys of the seizing plaintiff who was at the same time the purchaser. This service appears to have been made on them following the delay for service of a writ of summons and on the same day that the petition to annul the decree was presented or filed that Mr. Bergeron above mentioned appeared for the respondent Bernard, and again it is he, Bergeron, who represents the respondent Bernard on the present appeal. It appears, I think, on the face of the proceedings that the service of the petition, even upon the respondent Bernard, is sufficient. It also appears from the facts that I have enumerated that the respondent Bernard can have suffered no prejudice from irregularity in the service of the petition.

The day after the petition was filed he filed his exception to the form, namely, May 27, 1913, with a notice that the exception to the form would be presented to the Superior Court on

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June 11, 1913. The appellant did not request him to plead to the merits, but he obtained a considerable delay in order to prepare such plea which fully demonstrates the absence of prejudice. Before going farther I think I should cite also article 34, C.P.Q., which declares that in the absence of a special rule the delay for service for every step in the procedure is at least one clear day.

It is necessary to remark that to avoid prescription the appellant could not file his petition later than May 26. In respect to this the judgment of first instance enunciates a doctrine which is not that of the authorities nor of the jurisprudence in such case. The considerant in question is as follows:—

Considering that the seizing plaintiff has acquired by prescription a right of which we could not deprive him by amending the said petition nor permitting to be filed an affidavit which should accompany the said petition.

In support of an opinion contrary to the doctrine thus expressed in the judgment of first instance, I do not think that I could do better than to quote the observations of Chief Justice Dorion in the case of *Therrien* v. *Wadley*, 1 D.C.A. 301 (see the report of the citation).

One can see from these remarks what was the unanimous opinion of the Judges composing the Court in that case and especially what was the opinion of the Chief Justice. The notes of the learned Chief Justice furnish us with the views of Pigeau, the jurisprudence in France reported by Denizart, and also the decision of the Superior Court of Quebec confirmed in appeal.

For these reasons I believe that the exceptions to the form should be dismissed with costs in the Superior Court and the motion of the appellant for leave to file an affidavit in support of its *requête civile* is granted with costs of the motion in the Superior Court. The respondents Bernard and Bergeron are condemned to the costs of the present appeal.

*Judgment accordingly.*

## STEWART v. CANADIAN FINANCIERS.

B. C.

C. A.

*British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher and McPhillips, JJ.A. August* 10, 1915.

1. VENDOR AND PURCHASER (§ I E—27)—RESCISSION OF SALE—AGENT'S MISREPRESENTATIONS—AGENT ACTING FOR BOTH PARTIES—EFFECT.

Misrepresentations as to the character of land made by the agent of the vendor who also acted as agent for the purchaser for the purpose of sub-dividing and reselling it, does not impute to the purchaser knowledge of the true character of the land as affecting his right of rescission of the agreement of sale.

Statement

APPEAL by defendant in action for rescission of agreement for sale of land.

*Dorrell*, for appellant.

*E. A. Lucas*, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I would dismiss this appeal.

Irving, J.A.

IRVING, J.A.:—I would dismiss this appeal.

Martin, J.A.

MARTIN, J.A.:—There is only one point, not dealt with by the learned Judge below, upon which, in my opinion, an argument can be founded against the judgment. It is that though the plaintiff has proved that he did not have actual notice of the misrepresentation till very shortly before the action yet he must be held to have had constructive notice thereof because he appointed as his agent for the sale of the property the same agent (Crawford) of the defendant company who had made the misrepresentations to him upon which he bought. The appointment of the agent by the plaintiff was made while the purchase was being negotiated, to take effect immediately upon its conclusion, after which he, Crawford, was to have full charge of the new acquired property with the object of subdividing and re-selling it.

The peculiar feature about the case is that the notice that is thus sought to be constructively fastened upon the principal is not that which was acquired by the agent in the course of his duty after he became agent, but something he knew before that time in the course of his duty to another principal. In other words, the suggestion is that his prior knowledge should be carried over from the former to the present principal. Now, the very matter of which notice is sought to be constructively brought home to the new principal is that which was falsely represented to him, as the purchaser, by Crawford when he was

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agent for the vendor only. No case was cited to us which supports the contention that constructive notice should be imputed in such or similar circumstances. On the contrary, the most analogous authorities point to the unreasonableness of the expectation that the new agent should reveal his old duplicity to his new employer. See Williams on Vendor & Purchaser (2nd ed.), 248-9, 251-2; and *Waldy* v. *Gray*, L.R. 20 Eq. 238; *Re Hampshire Land Co.*, [1896] 2 Ch. 743, affirmed in *Re David Payne & Co.*, [1904] 2 Ch. 608; *Re Fenwick Stobart & Co., Ltd.*, [1902] 1 Ch. 507; and *The Birnam Wood*, [1907] P. 1, from which I extract and apply to the case at bar the following remarks of Lord Justice Cozens-Hardy, p. 13:—

> I think that really would be carrying the doctrine of implied notice to an extent which would be quite shocking and must interfere with honest and legitimate business dealings.

And Lord Justice Farwell says, p. 14:—

> The Courts have of late years been unwilling to apply the principle of constructive notice so as to fix companies or persons with knowledge of facts of which they had no knowledge whatever. It is extravagant to assume that this man Wotherspoon would have said anything whatever to the company about this unpaid bill of costs, though I do not think it is necessary to impute any dishonest design to him at all.

In *Wells* v. *Smith*, [1914] 3 K.B. 722, Mr. Justice Sutton said, p. 725:—

> I should be very slow to allow the effects of actual fraud to be nullified by constructive notice.

But, furthermore, even if it should be held that as regards others the principal would become affected with notice in such circumstances, *e.g.*, in the case of a subsequent sale by himself to a third party—yet it would not extend to this case where what is attempted to be done is that the deceived person when he applies for relief from the vendor who deceived him should be debarred because he must be assumed to have had notice of the deceit immediately upon his appointing as his agent the agent who had deceived him. It would, however, be unconscionable to permit the deceiving vendor to take the position that the misrepresentations made by his agent which induced the sale were not in fact true. So far as he is concerned he is, in my opinion, estopped from saying that his own representation made through the same channel as that by which notice is sought to be in-

ferred, was not true, though, of course, it would be open to him to shew that actual notice had been given through the same channel. As Mr. Justice Sutton said in *Wells* v. *Smith*, *supra*, p. 726:—

> I think a man who tells a lie to another cannot protect himself by saying, "Your agent should have warned you of my lie."

Now, the defendant company by its agent Crawford "told a lie" to the plaintiff.

The appeal should be dismissed.

Galliher, J.A.

GALLIHER, J.A.:—The sale herein was for two blocks of land aggregating approximately eleven acres, for a lump sum. The evidence is that had block 43 been as level as block 37 there would have been no complaint as to misrepresentation.

The plaintiff Stewart seems to have given his evidence honestly and to have relied absolutely on the representations of Crawford, the admitted agent of the defendants for sale, but the agent of Stewart for subdivision and re-sale.

I must say, however, that I have little sympathy for the position taken by Stewart after a lapse of about two years in which he made no further enquiry as to the nature of this property, and it may be that had defendants pleadings raised the question of whether Stewart had not so dealt with block 37 during the interval (or had that been the course adopted at the trial) as to preclude him from making *restitutio in integrum* a different result might have followed, but on the pleadings and the evidence adduced that question is not open to us, and as the case was presented I think the judgment below is right.

The appeal should be dismissed.

McPhillips, J.A.

McPHILLIPS, J.A.:—In my opinion the judgment of the learned trial Judge, Macdonald, J., should not be disturbed. I was at first considerably impressed with the view that our decision in *Stewart* v. *Cunningham*, 22 D.L.R. 845, would govern in the determination of this appeal, but upon full consideration of the facts—that decision cannot be said to be decisive—upon the particular facts of the present case, *Stewart* v. *Cunningham*, *supra*, was a case where the character of the land could not but be held to have come to the notice of the defendants in the action—the purchasers of the land; in the present case, however, such

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was not the case, although it is true there has been very considerable delay. The attempt was made upon the argument to shew that there was such constructive notice of the character of the land that the plaintiff should be disentitled at this late date from relying upon the misrepresentation that the land was *level land*: with this contention I cannot agree, and I entirely associate myself with what my brother Martin has said upon this point. The defendants must be held to be answerable for the misrepresentation of their agent which is clearly proved (*Lloyd* v. *Grace Smith & Co.*, [1912] A.C. 716; *Milburn* v. *Wilson*, 31 Can. S.C.R. 481), and the plaintiff would appear to have fully established the right to have rescission of the agreement of sale (*United Shoe Mfg. Co.* v. *Brunet*, [1909] A.C. 330, Lord Atkinson, at p. 338). *Appeal dismissed.*

SASK.

S. C.

## REX v. WEISS.

*Saskatchewan Supreme Court, Haultain, C.J. January 28, 1915.*

1. INDICTMENT, INFORMATION AND COMPLAINT (§ I—4)—REQUISITES—LEAVE TO PREFER FORMAL CHARGE.

Leave to a private prosecutor to prefer a charge in Saskatchewan upon which, in lieu of an indictment, the accused would in that province be triable should be refused if the Attorney-General has instructed his agent not to prefer a charge although there has been a committal for trial for the offence, unless such a strong *primâ facie* case is disclosed on the depositions as to suggest an attempt to stifle a proper prosecution.

2. INDICTMENT, INFORMATION AND COMPLAINT (§ I—4)—DISCRETION OF ATTORNEY-GENERAL IN ALBERTA AND SASKATCHEWAN.

In exercising the discretion given to the provincial Attorney-General in Saskatchewan and Alberta, under Cr. Code 873A, as to whether a formal charge shall be preferred on the depositions on which there has been a committal for trial, the Attorney-General has practically to perform what would be Grand Jury functions in provinces where there is a Grand Jury system.

[*Re Criminal Code*, 16 Can. Cr. Cas. 549, 43 Can. S.C.R. 434, referred to.]

3. STAY OF PROCEEDINGS (§ I—5)—CRIMINAL PROSECUTION—CR. CODE, SEC. 962.

In provinces where there is no Grand Jury system and therefore no indictment the case is not in the provincial Supreme Court for trial until a formal charge in lieu of an indictment has been preferred, and a stay of proceedings by the Attorney-General cannot be entered under Cr. Code, sec. 962, in the event of no formal charge having been laid.

[Note that for purposes of sec. 962 the term "indictment" includes a formal charge under Code sec. 873A by the interpretation clause, Code sec. 2 (16), as amended 1907.]

Statement

MOTION by private prosecutor for leave to prefer a charge of theft.

*T. J. Blain*, for applicant, the private prosecutor.

No one contra.

HAULTAIN, C.J.:—The accused, C. M. Weiss, was committed for trial at the present sittings of the Court by C. A. Berry, esquire, a justice of the peace, after preliminary inquiry into a charge of theft. At the opening of the Court, Mr. Sampson, agent for the Attorney-General, informed me that he was directed by the Attorney-General not to prefer a charge and to cause a stay of proceedings to be entered. Mr. Blain, on behalf of the private prosecutor, now asks me to allow him to prefer a charge under the provisions of sec. 873A of the Criminal Code. There can be no doubt that under that section I have the power to consent to a charge being preferred "by any person." The only question for me to consider is whether I should exercise that power in the present case.

Section 962 of the Criminal Code empowers the Attorney-General to direct a stay of proceedings "at any time after an indictment has been found against any person for any offence and before judgment is given thereon."

In this province we have no grand jury, so that an indictment cannot be found against any person. Strictly speaking, therefore, this case has not reached the point at which a stay of proceedings can be entered.

Under the law as it now stands, the trial of a person charged with a criminal offence is commenced without the intervention of a grand jury, or even, it would appear, without a preliminary inquiry by a magistrate, by a formal charge in writing preferred

1. By the Attorney-General; or
2. By an agent of the Attorney-General; or
3. By any person with the written consent of the Judge of the Court; or
4. By any person with the written consent of the Attorney-General; or
5. By order of the Court.

In this province the practice with regard to criminal charges is as follows: When any person is committed for trial, the justice of the peace before whom the preliminary inquiry is held transmits the original depositions to the clerk of the District Court of the district in which the offence is alleged to have been committed. The local agent of the Attorney-General for the district then transmits a copy thereof to the department of the Attorney-General. Upon receipt of a copy of the depositions as aforesaid,

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the Attorney-General either authorizes the local agent to prefer a charge, under the provisions of sub-sec. 2 of sec. 873A of the Criminal Code, or instructs him not to prefer a charge in the matter.

In exercising this discretion the Attorney-General is practically performing the functions of the grand jury: see *In re Criminal Code*, 16 Can. Cr. Cas. 549, 43 S.C.R. 434. In the present case this practice has been followed, and Mr. Sampson, the agent of the Attorney-General, has been instructed not to prefer a charge and to enter a stay of proceedings. As I have already pointed out, a stay of proceedings does not appear to be the appropriate action, as there has been no indictment found, and the case is not in Court. If an indictment had been found by a grand jury the Attorney-General would have had the right to direct a stay of proceedings, or in earlier times, to enter a *nolle prosequi*.

"The Attorney-General alone has the power to enter a *nolle prosequi*, and that power is not subject to any control. His decisions when exercising such functions were not subject to review by the Court of Queen's Bench, and are not now subject to review by the Queen's Bench Division or the Court of Appeal": *R.* v. *Comptroller of Patents*, [1899] 1 Q.B. 909, 914.

It must be admitted that there is not a complete analogy between a stay of proceedings or *nolle prosequi* and what has been done in this case. The practical result in this case is that the Attorney-General, on consideration of the whole matter, has instructed his agent not to lay a charge. As I have already pointed out, there is nothing in the Criminal Code to prevent me from consenting to a charge being preferred by any person. But I think that very strong reasons should be shewn to justify me in taking such a step, in face of the deliberate action of the Crown authorities. If the evidence taken on the preliminary inquiry disclosed such a strong *primâ facie* case against the accused as to suggest an abuse of his judicial discretion by the Attorney-General, or an attempt to stifle a proper prosecution, I should have no hesitation about consenting to a charge being preferred. But (and it should be almost unnecessary to say so) I can find nothing of that sort in this case. On the contrary, after reading very carefully the large mass of evidence taken on the preliminary inquiry, I am convinced that the Attorney-General exercised a sound discretion in directing that a charge should not be laid.

I must, therefore, refuse the application.

*Application refused.*

## JADIS v. PORTE.

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S. C.

*Alberta Supreme Court, Harvey, C.J., Scott, Stuart, and Beck, JJ.*
*May* 15, 1915.

1. EVIDENCE (§ VI H—560)—PAROL EVIDENCE—ADMISSIBILITY—FRAUD OR MISTAKE.

Where fraud, mistake or accident is set up, the rule that parol evidence to modify a written instrument is not admissible is inapplicable to the extent of the facts and circumstances relating to the instrument or portion thereof put in issue by the allegation of fraud, mistake or accident.

Statement

APPEAL from a judgment of Ives, J.

*D. H. MacKinnon*, for plaintiff, respondent.

*A. M. Sinclair*, for defendant, appellant.

The judgment of the Court was delivered by

Beck, J.

BECK, J.:—This is an appeal from the decision of Ives, J., at the trial without a jury, by which he gave judgment against the defendant for $1,178.28 on a covenant contained in an instrument dated June 24, 1913, whereby the defendant, who had sold certain land to one Connell under an agreement, assigned his interest in the unpaid purchase money to the plaintiff. The covenant was in the following words:—

> And the said assignor (Porte) doth further covenant, promise and agree, to and with the said assignee (Jadis), that in case of default by the purchaser (Connell) in payment of any sum or sums of money which shall become due or owing under the said articles of agreement (Porte, vendor, to Connell, purchaser), he (Porte) will forthwith, on demand, well and truly pay or cause to be paid to the said assignee (Jadis) any sum or sums in default.

The substantial defence set up by the defendant in his statement of defence, and which he sought to establish at the trial, was that this covenant appeared in the instrument of June 24 by mistake, it not being the intention of either party that the defendant should personally guarantee payment. Evidence upon the question of mistake was extracted from the plaintiff on his own cross-examination.

The plaintiff admitted that the agreement between him and the defendant was "really a trade"; that the plaintiff agreed to sell his house to the defendant for $5,500, which was subject to a mortgage for $2,200; that the defendant was to assume this mortgage and assign to the plaintiff the moneys owing by Connell under the agreement of sale (Porte to Connell) and pay the balance in cash; that this agreement was embodied in the following memorandum drawn by the defendant, who was a law student:—

> Edmonton, Alta., June 23rd, 1913.
>
> Received from George Reginald Porte the sum of $5, being deposit on [illegible]20, block 38, Norwood Plan, in the city of Edmonton, in the Province of

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Alberta. Price, $5,500; cash, $609; agreement of sale, $2,691, and the balance by the purchaser, George Reginald Porte, assuming and paying a certain mortgage now registered against the property for the sum of $2,200. (Sgd.) W. H. Jadis.

The agreement of sale, Porte to Connell, was for a quarter section of land, the original price of which was $4,000, and, as already appears, this amount had been reduced to $2,691. Referring to the making of the agreement, the plaintiff said in cross-examination:—

Q.—You agreed that evening (23rd June) upon the bargain between you, did you? A.—Yes, the bargain was made that evening.

Q.—And Mr. Porte wrote down what the bargain was, didn't he?—he gave you $5 as a deposit? A.—Yes.

Q.—And he made out this receipt—that is your signature?

Q.—You got the deposit of $5, and Mr. Porte wrote out this receipt setting forth the terms of the bargain, and you signed it? A.—Yes, I signed that.

Q.—And that was all that took place on the 23rd, wasn't it, that night—I mean to say, after you had some talk about it and then you decided? A.—Yes.

Then it was arranged that the formal documents should be drawn by the defendant and that the plaintiff should call late the next afternoon, when they would be executed. He called and they had not been completed. Then his evidence continues:—

Q.—Mr. Porte dictated the various documents, the transfer by you, and you signed it; and then he dictated a document, an assignment of the agreement for sale (meaning the assignment of the moneys owing under the agreement Porte to Connell); so all that was done that night was the making out of the papers to carry out the agreement you made on the 23rd? A.—Yes.

Q.—There were not further negotiations that night, nothing beyond making out the papers, were there? A.—No, there was no discussion that night.

The assignment (in which the covenant in question is contained) from the defendant to the plaintiff of the moneys owing to the defendant under the Connell agreement is a printed form, and the covenant in question is in print.

The only evidence given on behalf of the plaintiff was his own and some portions of the examination for discovery of the defendant which have no relation to the question now under consideration.

At the conclusion of the plaintiff's case, Mr. Sinclair, counsel for the defendant, moved for a dismissal of the action on the ground that the evidence shewed that the receipt of June 23 contained all the terms of the real agreement, and that inasmuch

the formal assignment drawn for the purpose of effectuating that agreement contained a personal guarantee of payment not suggested in the negotiations or the receipt, a mistake in the formal assignment was established. Mr. Sinclair, in argument, said:—

An assignment is a conveyance of the interest of the assignor to the assignee, really putting the assignee in the shoes of the assignor.

The Court: And it usually comprehends a guarantee that there is a debt.

Mr. Sinclair: Precisely. It guarantees that there is a debt—there is a warranty of *debitum sub esse*, but not, unless it is specifically agreed, a guarantee that it will be paid.

This motion was refused, and the defendant was called as a witness on his own behalf. After the defendant had given some evidence the case proceeded as follows:—

Mr. McElwaine: Tell your own story, what were the negotiations? A.—When Mr. Jadis came into the office he wanted to know what this agreement was that I owned, and I shewed it to him and told him what it was on. We arranged terms first, the terms of the deal as set out in the agreement, I think $600 cash, and the assignment of an agreement, $2,600, which had $91 accrued interest on; I was to give him that for his equity in the house and assume $2,200 on the house. Before there was any agreement signed up Mr. Jadis said to me, "I don't know this man Connell, are you sure he will make the payments"—(His answer was interrupted.)

Mr. Mackinnon: Mr. Porte's agreement is here and it speaks for itself.

Mr. Sinclair: Our defence is this, that the appearance of that clause in the agreement is a mistake, and we further state that the agreement was really made on the 23rd of June. If I can prove, as I hope to do, that this matter was discussed between the parties and there was a specific refusal to insert such a clause, and after that refusal had been made and acquiesced in this document of the 24th without any further discussion or any revival of the question of guarantee was executed, and I can shew how the clause appeared there and can account for its being there, then I submit I would be entitled to have it struck out. I am not attempting to vary a written document at all.

Mr. Mackinnon: Decidedly.

The Court: No, you are trying to make a new one.

Mr. Sinclair: I am trying to bring it in the condition it should be in had it not been for the mistake.

The Court: What was the mistake?

Mr. Sinclair: The mistake was, they came in at half-past five at night, and the stenographers were leaving—everybody was in a hurry, and the defendant told the girl to get a form of assignment of agreement for sale of the vendor's interest, and he dictated to the girl the typewritten parts which were put in and signed, and he wasn't aware of such a clause being in.

The Court (after further argument): I will not admit the evidence to change that agreement.

Mr. Sinclair: How far will your Lordship allow me to go?

The Court: I will not allow you to go to any extent in giving evidence that will change the agreement of the 24th of June, the assignment, unless

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you can shew me something ambiguous about it, something that needs explanation.

Mr. Sinclair: I suppose that means that your Lordship will not allow me to give evidence as to what took place at the preparation of that agreement?

The Court: No, I think I will not; I think you have given all the evidence you can of that document.

The defendant having entered upon his defence, it is now immaterial to consider whether the learned trial Judge's view at the conclusion of the plaintiff's case was right or wrong; but I have no doubt at all that he was wrong in refusing to permit the defendant to go fully into the evidence of the negotiations preceding the execution of the assignment; mistake having been set up. It is elementary that where fraud, mistake or accident is set up the rule that parol evidence to modify a written instrument is not admissible is inapplicable to the extent of the facts and circumstances relating to the instrument or portion thereof put in issue by the allegation of fraud, mistake or accident.

The defendant here clearly had the right to have all the evidence heard that he could adduce relating to the negotiations and to the preparation and execution of the documents, to place the Court in a position to decide the issue of mistake. As he was refused this right he is clearly entitled to a new trial.

In *Colonial Investment Co.* v. *Borland*, 5 A.L.R. 71, (appeal dismissed, 6 D.L.R. 211), I collected a number of cases relating to instruments which failed to express the true intention of the parties. Among others, I referred to *Ball* v. *Storie*, 1 Sim. & S. 210, 57 E.R. 84. I quote from it, as it not only states the rules of evidence applicable in such cases as this, but also decides, what it seems to me ought to require no authority, that the party seeking relief from a mistake in a document will not be refused relief merely because he himself actually drew the clause to which he takes exception, even if the party be a legal practitioner. Leach, V.C., said:—

If, however, this case requires the decision of the Court upon the point, whether a Court of Equity will refuse to reform an instrument which has mistaken the intention of the parties, because it happened to be drawn by the party seeking that reformation, I am prepared to give my opinion upon that point. The rule at law, that evidence is not admissible to contradict or explain a written instrument, stated *simpliciter*, is received in equity as well as at law. A Court of Equity does, nevertheless, assume a jurisdiction to reform instruments which, either by the fraud or mistake of the drawer, admit of a construction inconsistent with the true agreement of the

parties. And, of necessity, in the exercise of this jurisdiction, a Court of Equity receives evidence of the true agreement in contradiction of the written instrument. If the true agreement and the consequent mistake in the written instrument be established by the evidence, can a Court of Equity refuse relief because it appears that the party seeking relief himself drew the instrument, unless it be a principle in a Court of Equity not to relieve a party against his own mistakes? There is no such principle in a Court of Equity. Common mistake is the ordinary head of jurisdiction; and every party who comes to be relieved against an agreement which he has signed, by whomsoever drawn, comes to be relieved against his own mistake. In *Bishop* v. *Church*, 2 Ves. 100, the bond was drawn by the obligee, in whose favour it was established to be several as well as joint. If, therefore, this instrument had been wholly drawn by the plaintiff, I should still have been of opinion that the injunction must be continued.

Again, in *Edmonton Securities Co.* v. *LePage*, 14 D.L.R. 66, in our own Court, in which Stuart, J., gave the judgment of the Court, he said, p. 69:—

> In such a case I think the rule is clear that the party is entitled to shew all the circumstances connected with the making and signing of the agreement, and then it becomes a question in each case, considering all the circumstances, whether he should be held to be bound by the document he has signed. One of the circumstances would be the fact that he had not really made the agreement contained in the clause, which he claims to have been inserted by mistake, assuming that fact to be established. Even if he should establish that fact, it would not necessarily follow that in every case he should be relieved from the consequence of his having signed the agreement. But this does not prevent him, where he pleads his mistake, from giving oral evidence of the circumstances, including in these the verbal negotiations which resulted in an agreement between the parties. A particular circumstance in this case is that the document was obviously drawn up by the plaintiffs, which makes the case stronger even than *Ball* v. *Storie*, 1 Sim. & S. 210, 57 E.R. 84. See also Kerr on Fraud and Mistake, p. 496.

A further point was raised by the defendant, namely, that the plaintiff was not entitled to succeed inasmuch as he had failed to prove that a demand had been made upon him prior to action, his obligation under the covenant arising in any case by the express words of the covenant only after demand. I find no evidence of demand. On the other hand, I doubt if the defendant has sufficiently raised this question by his statement of the defence, but, in view of the other ground with which I have dealt it is not necessary to consider what should properly have been done by this Court if this latter point were the only one involved.

The case is clearly one in which the judgment for the plaintiff should be set aside. Taking the whole evidence as far as it was allowed to go—I have extracted only portions of it—I think sufficient appears, if no further evidence were available, to entitle

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the defendant to judgment; but, as further evidence is available, and perhaps some on the plaintiff's behalf, I think justice will be reached more certainly by directing a new trial if the plaintiff wishes it.

I would, therefore, direct a new trial, subject to the condition that the plaintiff set the case down for retrial by the 1st June next; that if he does so the costs of the former trial should abide the result of the retrial; that if the case is not so set down for retrial judgment be entered for the defendant dismissing the action with costs. I would give the costs of this appeal to the defendant in any event. *New trial ordered.*

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## BUFF PRESSED BRICK CO. v. FORD.

*Ontario Supreme Court, Appellate Division, Falconbridge, C.J.K.B., Riddell, Latchford, and Kelly, JJ. March 11, 1915.*

1. CORPORATIONS AND COMPANIES (§ IV H—161)—PROMOTERS AND INCORPORATORS—LIABILITY OF—COMPANY'S LIABILITY FOR ACTS OF.

The prospectus is the basis of the subscription for company shares and the company issuing shares upon a subscription contract based upon a prospectus thereby adopts the prospectus although it was issued before the incorporation of the company; but where a person becomes one of the original incorporators there is no ratification by the company of any misrepresentation made by a promoter whereby a person was induced to become one of the incorporators and to join in the petition for the company's charter; each petitioner by signing the memorandum of incorporation becomes bound not only as between himself and the company but as between himself and the other persons who may become members.

[*Re Metal Constituents Ltd.*, [1902] 1 Ch. 707, followed.]

Statement

APPEAL by the plaintiff company from the judgment of MULOCK, C.J.EX.

*S. H. Slater*, for appellant company.

*E. E. Gallagher*, for defendant, respondent.

Riddell, J.

RIDDELL, J.:—One Brinker, engaged in promoting a brick company, is said by the defendant to have committed a fraud upon him by concealing his interest in the matter, and thereby to have induced the defendant to take a share in the proposed enterprise. The defendant with others signed a petition to the Lieutenant-Governor asking for a charter, the defendant being a subscriber for ten shares; the charter was granted in January, 1914, and names the defendant as one of the corporators.

Calls were properly made upon the stock: the defendant refused to pay; and this action was brought. He defended on

the ground that he had been induced to subscribe by the fraud of the promoter: and the case came down for trial before the Chief Justice of the Exchequer at Hamilton, without a jury.

The learned Chief Justice found the facts in favour of the defendant, and dismissed the action. The plaintiff company now appeals.

There is no doubt that if shares are subscribed for on the faith of a prospectus, shares issued on such a subscription, if it is fraudulent and the fraud induces the subscription, are not to be forced upon the subscriber, "for the prospectus is the basis of the contract for shares," and the company by issuing stock thereon ratifies and adopts the prospectus: *Pulsford* v. *Richards* (1853), 17 Beav. 87; *Jennings* v. *Boughton* (1853), 17 Beav. 234; and it makes no difference if the prospectus be issued before incorporation: *Karberg's Case*, [1892] 3 Ch. 1. See also *Henderson* v. *Lacon* (1867), L.R. 5 Eq. 249; *Ross* v. *Estates Investment Co.* (1868), L.R. 3 Ch. 682; *Lynde* v. *Anglo-Italian Hemp Spinning Co.*, [1896] 1 Ch. 178; *Roussell* v. *Burnham*, [1909] 1 Ch. 127; *In re Pacaya Rubber Co.*, [1914] 1 Ch. 542.

But where a person petitions for a charter and becomes an original shareholder named as such in the charter, the same rule does not apply. Any misrepresentation made is the act of a promoter, not the company; the company, not being in existence, cannot make any misrepresentation, and there is no ratification (if there could under the circumstances here be ratification) by the company: *In re Northumberland Avenue Hotel Co.* (1886), 33 Ch. D. 16; *In re Rotherham Alum and Chemical Co.* (1883), 25 Ch. D. 103; *Clinton's Claim*, [1908] 2 Ch. 515.

The matter came up squarely in *In re Metal Constituents Limited*, [1902] 1 Ch. 707, where the decision is rested both on the ground I have stated and on the ground that, by signing the memorandum, the applicant became bound, not only as between himself and the company, but as between himself and the other persons who should become members.

The distinction between the cases of a shareholder who is allotted stock by the company and one who is a petitioner and a charter member was not present to the mind of the learned Chief Justice, but it is thoroughly established and is unassailable on principle or authority.

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In this view, it is unnecessary to consider whether the alleged misrepresentations were in fact made, or, if made, whether they were such as would give the defendant the right to repudiate.

I am of opinion that the appeal should be allowed with costs and judgment entered for the plaintiff company for the amount sued for with costs.

FALCONBRIDGE, C.J.K.B., and LATCHFORD and KELLY, JJ., agreed in the result. *Appeal allowed.*

QUE.

K. B.

## RICHARDSON v. PARADIS.

*Quebec Court of King's Bench (Appeal Side), Trenholme, Lavergne, Cross, Carroll, and Archibald, JJ.*

1. WATERS (§ I C—87)—NAVIGABLE RIVERS—RIPARIAN OWNERS — MILL-OWNER—LUMBERMEN—RIGHTS AND LIABILITIES.

The rights of lumbermen are concurrent with those of riparian owners to the use of the waters of navigable and floatable streams, for the purpose of carrying on their business, and where a dam has been constructed and used by a millowner for a number of years, and no one has ever complained of it as an obstacle to the floating of logs; the lumberman who has built other dams and increased the volume of water and the force of the current so as to enable him to carry on more extensive operations and float down larger logs, will be liable to the millowner for damages caused by these new operations.

Statement

APPEAL from a judgment of the Superior Court.

*Fiset & Tessier*, for appellant.

*Perron & Taschereau*, for respondent.

The judgment of the Court was delivered by

Lavergne, J.

LAVERGNE, J.:—This was an appeal from a judgment rendered by the Superior Court on October 3, 1913, in favour of the respondent, condemning the appellant to pay him the sum of $300. The action arose from damages caused by the appellant to the respondent by the floating of logs of the appellant in the river Des Capucins.

The appellant is owner of large timber limits at this place. For a dozen years it has been content to do business with small sized lumber, but for two or three years past it has commenced to cut large timber in small quantities, and in 1912, it considerably increased its operations. In floating its logs down the river it was necessary that they should pass near the property of the respondent who owned upon the river a dam, a flour mill and several other appurtenances. In 1912, when the appellant had floated down 40,000 logs of large size, that is of 12, 14, and

16 ft., it commenced a business which it had never before carried on upon so large a scale.

The dam of the respondent has been constructed upon the river for 38 years and no one has ever complained of it as an obstacle to the floating of logs. The respondent himself, by reason of the floating of the logs, had suffered only slight damage for which he had never made a claim.

Before 1912, the appellant itself had built a slide at the dam of the respondent to facilitate the descent of the logs and also some small wharves to protect the respondent's property.

It appears to me that if the appellant had any complaint to make of the respondent's dam, the time to do so was before he had changed the nature of his business and entered upon an industry totally different from that previously carried on. But without in any way putting the respondent *en demeure*, without complaining of his dam, the appellant prepared to carry on a business in large timber. As I have already said he had made a slide and small wharves and had apparently assumed the obligation of protecting the respondent against the damages that he might cause him by sending down his timber.

The appellant to increase his business had also before the year 1912 built two dams above the respondent's dam, the one some miles and the other even farther above the mill. In the spring of 1912, during the driving season, the appellant opened and closed these dams alternatively, causing the volume of water to rise by several feet in the river and increasing its pressure in a degree until then unusual and which would have been impossible without the use of these dams. The appellant always with the object of facilitating its operations had also excavated the bed of the river near the place where the respondent had his constructions. As a result of these works the force of the water in the river has been considerably increased during the driving of the logs. As a consequence of this increase and of the force of the current the logs in their descent have caused considerable damage to the property of the respondent in 1912, damages unusual up to then. The respondent attributes this damage to the dams built in the river above his mill of which the appellant makes use during the drive.

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Lavergne, J.

The respondent has claimed damages to the amount of $1,500, the appellant has confessed judgment for $50. This confession of judgment was not accepted. The appellant under reserve of his confession of judgment pleaded to the action denying the facts alleged in the declaration. It admitted that it had driven the logs down the river and that it had a dam situated some 6 miles above the respondent's mill and alleged that the drive had been made with prudence and with necessary precautions; that the waters of the river were very much higher in the spring of 1912 than usual from causes for which he could not be held responsible; and finally that if the respondent has suffered any damage it was due to the defective construction of his dam and of his own want of care.

The respondent has proved that he is the owner of land irregular in form, 2 arpents in length along the river, to part of another piece of land of 10 arpents in the vicinity, but of which there is no question in this case. It is true that the dam of the respondent does not traverse the river in a direct line; that the length of this dam is 60 ft., while it would only be 55 ft. if it traversed the river perpendicularly to its banks.

As I have said above, the appellant has never complained of this defect and the dam has existed in the conditions that I have mentioned for 38 years as well as for some years before the respondent became owner. The respondent has operated a flour mill and dwelt there with his family and this is his only occupation. This mill is sufficiently patronized in the four or five surrounding parishes; it gives the respondent a revenue of about $2,500. The damages are admitted to have been caused by the driving of the appellant's logs and the latter has confessed judgment for the sum of $50 as I have said.

It is necessary then to estimate the amount of the damages thus caused and the responsibility of the appellant therefor. It is necessary also to determine if the construction of the respondent's dam was in whole or in part the cause of these damages.

The law upon this question has been several times well interpreted by the Courts. It is perfectly established that the lumbermen have the right to make use of the waters of the rivers for floating their logs, but, subject to payment for damages they

cause to the riparian owners. They have a right to erect works upon these rivers for the purpose of facilitating this floatation. The riparian owners have also the right on their side to utilize these rivers for their industry or their business.

A careful examination of the evidence has caused me to conclude that there was considerable damage caused to the respondent by the driving of the logs in question; some parts of his land which was already very small have been destroyed by the logs in their descent. The pressure and the force of the water having been considerably increased by the works placed upon the river by the appellant and especially by their dam by which they collected the water to allow it afterwards to disperse abundantly in the direction of the respondent's mill.

The quantity of water thus accumulated and the increase in the force of the current was such that the logs had in the year 1912, while floating down drawn with them considerable quantities of sand, branches of trees and détritus of all kinds which choked the entrances of the respondent's mill to such a degree that he was obliged to suspend operation for several weeks, the water not running into his mill.

The rights of lumbermen, as the Judge of first instance says, are concurrent with those of riparian owners. These rights engender obligations and reciprocal duties; it is necessary then to establish the responsibility in this respect of the two parties.

The Judge of first instance has estimated the damages caused at $525 according to his appreciation of the evidence, an appreciation which has been made with very great care. For the defect in the respondent's dam of which the appellant complains for the first time, the judgment of first instance has held the respondent responsible for a part of the damages and in lieu of the sum of $525 he has awarded him only $300 and I am of opinion that he is right in doing so.

The respondent can only be responsible for a very small part of the damages caused. I believe the appreciation of the Judge to be perfectly reasonable and incontestable. Moreover, it is not upon a question of this kind the custom of Appeal Courts to interfere.

For these reasons I am then of opinion that the judgment should be confirmed with costs. *Judgment confirmed.*

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S. C.

## Re SOUTH EAST CORPORATION Ltd.

*Alberta Supreme Court, Harvey, C.J., Scott, and Stuart, JJ.*
*March 26, 1915.*

1. CORPORATIONS AND COMPANIES (§ VI F 1—345)—DISSOLUTION AND WINDING UP—OPPOSITION BY CREDITORS—FUTILITY OF PROCEEDINGS.

The onus is on those opposing a creditor's application for a winding-up order, where the statutory presumption of the company's insolvency arises, to prove that there is no reasonable possibility of any benefit accruing to the applicant and other unsecured creditors from the winding-up.

[*Re Crigglestone Coal Co.*, [1906] 2 Ch. 327, referred to.]

Statement

APPEAL from a winding-up order made by Simmons, J.

*H. A. Chadwick*, for defendant.

*Lloyd H. Fenerty*, for plaintiff.

The judgment of the Court was delivered by

Harvey, C.J.

HARVEY, C.J.:—This is an appeal by the corporation from a winding-up order made by my brother Simmons at the instance of the petitioner who is an execution creditor.

The sheriff has had in his hands since last August an execution against the corporation for nearly $10,000 on which a seizure was made of all the chattels of the corporation in the same month. The petitioner's execution is for about $600 and has been in the sheriff's hands since last November. Both executions are unsatisfied.

The Winding-up Act, ch. 144, R.S.C., provides that: "The Court may make a winding-up order when the company is insolvent." (sec. 11 (*c*.)) "The application may be made by a creditor for the sum of at least $200" (sec. 12(*c*)). "A company is deemed insolvent—if it permits any execution issued against it under which any of its goods, chattels, land or property are seized, levied upon or taken in execution, to remain unsatisfied . . . for fifteen days after such seizure." (sec. 3 (*h*.))

In answer to the petition, the corporation filed the affidavit of its secretary-treasurer, who states that in 1911 it purchased land for $175,575, of which it has paid $85,575, and of which there remains unpaid about $95,000. That it has constructed an electric railway at a cost of about $80,000, that it has assets in excess of liabilities of the value of about $157,750, that there is $2,750 of subscribed capital unpaid, that, owing to financial stringency it is unable to sell its land at its fair value, and that if it is sold now it must be at a sacrifice, also that the other exe-

cution creditor is content to wait, and that the winding-up cannot benefit any one, but, on the contrary, will only put the company to additional expense and liability and depreciate its assets. It is contended that this affidavit shews that the company is not in fact insolvent and that, therefore, the right to the winding-up order does not exist.

Even if it would be a fair inference from the facts shewn that the company is not in fact insolvent, which I think it is not, it would not, in my opinion, affect the right of the petitioner. If the petitioner cannot realize his debt it is of no benefit to him for the company to say, "we could pay your debt if we wanted to but you cannot compel us to do so by the usual process." The right that is given him to wind up the company is a right that is given him to enable him to realize when he cannot do so by ordinary legal process, and when the Act says that a company is deemed to be insolvent when the conditions specified exist, it means, I think, that for the purpose of the Act it is insolvent.

It is contended, however, that the order to wind up should not be granted unless some benefit can be derived by the petitioner, by virtue of the winding-up, and that he has nothing to gain in this case because the company is not carrying on business and the sheriff can do all that a liquidator could do.

The latest case to which we have been referred is *Re Crigglestone Coal Co.*, [1906] 2 Ch. 327, in which the earlier cases as to the right of a creditor to compel a winding-up are considered. In that case the debenture holders opposed the winding-up on the ground that there were no assets for unsecured creditors, but it was held "that the onus was on them to prove that there was no reasonable possibility of any benefit accruing to the unsecured creditors from the winding-up, and that unless that onus was discharged, the petitioner was entitled to the winding-up order."

Buckley, J., who made the order says, at p. 330:—

I will state shortly what I take to be the law. First, as between the creditor and the company who are his debtors, the unpaid creditor who shews insolvency is entitled *ex debito justitiæ* (as it is generally termed) to a winding-up order—that is to say to an order by virtue of which the creditor, by the hands of the liquidator, is entitled to seize the assets of

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his debtor and administer them for the payment of himself and other creditors. . . . This right of the unpaid creditor may be called, as Lord Bower called it, in *Re Chapel House Colliery Co.* (24 Ch.D. 259), a right to equitable execution. A creditor who obtains judgment and issues execution at law has a legal right to the means of satisfying his judgment.

He notes one or two apparent exceptions which are not of importance here. In appeal, Collins, M.R., at p. 337, says:—

The appellants are met to start with by the proposition affirmed by the House of Lords that *primâ facie* the right of a creditor who cannot obtain payment of his debt to obtain a winding-up order is *ex debito justitiæ* . . . If there is a reasonable probability, or even a reasonable possibility—I think it may be put as high as that, that the unsecured creditors will derive any advantage from a winding-up, the order ought to be made.

Romer, L.J., and Cozens-Hardy, L.J., both expressed themselves as of the same opinion.

Now, in the present case, it is perfectly clear that only by the winding-up can the petitioner make available for creditors the unpaid capital. It is not much compared with the liabilities, but it is something, and it is not unreasonable to think that a liquidator will be able to make more for the creditors out of the assets than the sheriff can. It is apparent, therefore, that there is not merely a possibility, but also a probability, that the creditors may derive some benefit from the winding-up, and the petitioner therefore, is entitled to the order. The appeal should be dismissed with costs. *Appeal dismissed.*

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S. C.

## DOWNS v. FISHER.

*Ontario Supreme Court, Falconbridge, C.J.K.B., Riddell, Latchford and Kelly, JJ. April 8, 1915.*

1. AUTOMOBILES (§ III C—310)—CAR DRIVEN BY SERVANT OF GARAGE KEEPER—LIABILITY OF OWNER.

The taking of an automobile which has been placed in a garage for repairs and which is driven by a servant of the garage keeper without the owner's consent will render the owner liable in damages for injuries thereby occasioned, in virtue of sec. 19 of the Motor Vehicles Act, R.S.O. 1914, ch. 207.

2. AUTOMOBILES (§ III C—300)—CAR DRIVEN BY ANOTHER—LIABILITY OF OWNER—LARCENOUS TAKING—WHAT IS.

The taking by a servant of a garage keeper without the owner's consent of a car stored in the garage for repairs, the servant mistaking it for a demonstration car, raises no such *animus furandi* as to render such taking an act of larceny, which will relieve the owner from the liability imposed by section 19 of the Motor Vehicles Act, R.S.O. 1914, ch. 207.

Statement.

APPEAL by the defendant from the judgment of a District Court Judge. The following is a statement of facts.

The defendant Fisher was the agent at Port Arthur for the Hudson "6" automobile, and had a garage. The defendant Whalen bought a car of that description, which got out of order, and Whalen placed it in Fisher's garage for repair, as he was in the habit of doing. Smith, the servant of Fisher, seems to have thought it was a "demonstrating car," although it was not left for any such purpose, but only for repairs. Another car broke down, and Smith, without the knowledge of Fisher or Whalen, took out the Whalen car, and was towing the disabled car into the garage, when, by his negligence, an accident happened to the plaintiffs on the 30th November, 1913.

The plaintiffs, on the 18th February, 1914, sued Fisher alone; but, on the case coming down for trial, Whalen and Smith were added as defendants, and the case was enlarged. Thereupon the plaintiffs delivered a new statement of claim, charging Whalen as the owner of the automobile, Smith as the servant of Fisher and the actual wrong-doer, and Fisher as his master. Each defended, and Whalen claimed indemnity over against Fisher and Smith. An order was obtained that the question of indemnity should be tried at the trial of the action.

The case then came on for trial before His Honour Judge O'Leary of the District Court, in December, 1914, and that learned Judge endorsed the record thus: "12th January, 1915. There will be judgment for the plaintiff against the three defendants, W. J. Fisher, H. Smith, and John A. Whalen, for $509 and costs, with relief over in favour of John A. Whalen against the defendants Fisher and Smith for whatever amount the defendant Whalen may be compelled to pay to either for damages or costs." Judgment was entered accordingly.

Notice of appeal was given by Fisher and Smith, but their appeal was not proceeded with and was dismissed with costs.

Notice of appeal was also given by Whalen.

*Thomson, Tilley & Johnston*, for appellant.

*C. A. Moss*, for plaintiffs, respondents.

RIDDELL, J. (after setting out the facts as above):—The accident took place before the coming into force of the Act

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of 1914, 4 Geo. V. ch. 36, sec. 3, and must be decided upon the law as it stood before that statute.

In *Lowry* v. *Thompson*, 15 D.L.R. 463, it was claimed that damage had been done by the negligence of some person running the defendant's car. It was proved to a demonstration that, if this was the defendant's car, it had been taken out of his garage without his knowledge and consent. After the judgment against the defendant, he moved for a dismissal of the action. On the facts of that case—unless he was liable for the negligence of the person running the car, and for the reason that he (the defendant) was the owner of the car—he was entitled as a matter of law to a dismissal of the action. We refused to dismiss the action, thereby, as I humbly conceive, holding as a matter of law that the fact that the car had been taken from his possession without his consent was no defence. The Chief Justice said (p. 483): "On the jury's first verdict" (i.e., that the car had the same number as the defendant's), "the plaintiff was not entitled to judgment. On the second" (i.e., that the car was in fact his) "if allowed to stand, he is." He thought a new trial should be granted. "The evidence of the defendant was entitled to due consideration, but was apparently ignored by the jury, who seem to have based their verdict solely on the fact that the number of the car in question was the same as the defendant's. That circumstance may have established a *primâ facie* case, but the defendant adduced evidence the other way which should not have been ignored. . . . It was the duty of the jury to give due consideration to the important evidence adduced on behalf of the defendant." This was of course *nihil ad rem*, if the defendant was not to be held liable even if the car was found to be his; and the language is unambiguous and clear—"On the second, if allowed to stand, he is" entitled to judgment.

My brother Sutherland concurred in granting a new trial, which, as I have pointed out, would not be proper if such a defence as there proved were sufficient. My brother Leitch and myself made our meaning plain beyond controversy (p. 488): "Had it been proved and found by the jury that the accident in question had been caused by a violation of the Act . . . I think

that the owner of the car would not escape liability; but that has not been proved or found."

The case of *Cillis* v. *Oakley*, 20 D.L.R. 550, 31 O.L.R. 603, then came on before the Second Divisional Court. There the car had been placed out of commission (so to speak) by the removal of the spark-plug, but had been stolen by a person who was convicted of the theft. *Lowry* v. *Thompson* was not overruled, as indeed it could not be: see. 32(1) of the Judicature Act, R.S.O. 1914, ch. 56. The Chief Justice, apparently referring (p. 609) to his statement in the *Lowry* case (that, if the car were the defendant's, the plaintiff would be entitled to judgment), says: "It is obiter as to whether the owner of a stolen car is liable for an injury caused by it when in control of the thief. That question I neither considered nor discussed, and no observation in my judgment was intended to have any bearing upon it."

This statement is wholly exact if taken as it stands. The car in the former case was not stolen nor in control of the thief; but I have already pointed out that the learned Chief Justice did discuss and of course did consider the liability of the owner of the car when the car was not in his possession, but had been taken out of it without his knowledge or consent.

Mr. Justice Sutherland says (p. 610): "When the owner of a motor, as here, has taken the very reasonable precaution of withdrawing the spark-plug, and thus rendering the machine harmless and incapable of motion, and it is stolen by a thief . . . I am unable to believe that the Legislature intended by the section to make the owner liable, or that, read in the light of the Act as a whole, it has that effect."

Mr. Justice Clute discusses the case only of a car being stolen, and thinks that the statute does not "create a liability against such owner, for the act of one over whom he had no control, and who, in order to be in a position to perpetrate the act causing the injury, had committed a crime against the owner by stealing his motor" (p. 606); and considers that *Lowry* v. *Thompson* does not compel us "to hold . . . that the owner of a motor is liable for damages done by the motor when in the hands of a thief without negligence on the part of the owner" (p. 607).

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My brother Leitch and I thought it did.

The decision in *Cillis* v. *Oakley* does not overrule that in *Lowry* v. *Thompson*. Of the Judges who took part in the last named case, two (my brother Leitch and myself) thought it covered the case of a stolen car. The Chief Justice did not recant his opinion as expressed in the earlier case (that if the car were the defendant's the plaintiff should recover, but if it had only the same number as the defendant's he should not), as of course he would have done had he considered it wrong in law, but contents himself with saying that "it is obiter as to whether the owner of a stolen car is liable for an injury caused by it when in control of the thief" (p. 609). Both the other Judges confine their opinion to the case of a stolen car: "stolen by a thief" (p. 610); "one . . . who, in order to be in a position to perpetrate the act causing the injury, had committed a crime against the owner by stealing his motor" (p. 606).

Remembering that the *Thompson* car had not been "stolen by a thief," but had apparently been taken out by some one (a former chauffeur of the defendant's was violently suspected), and returned forthwith, both cases can stand; they are not at all inconsistent. It is of course our duty to follow both decisions. Certainly the former is not overruled and could not be, and the latter stands unshaken.

The result will be that the law before the Act 4 Geo. V. ch. 36, sec. 3, is not very much altered by the Act. Before the Act, an owner was liable for injury done by his car unless the person in charge of it had stolen it from the owner; now the law is the same except that the owner is not excused if the larcenous person in possession of the car is his employee.

It was urged upon us that in considering the case we should not draw fine distinctions; and I entirely agree. But it is better to draw fine distinctions than to do injustice. If the law was not as I have indicated, the Court did a very grave injustice to Thompson by compelling him to undergo the expense, annoyance, and risk of a new trial to determine a matter which was absolutely immaterial—or to Cillis in depriving him of a righteous verdict. We must strive to prevent injustice by all

legitimate means; and should be loath to hold that the Court has perpetrated injustice upon any litigant.

The language of the Chief Justice of Ontario in *Wynne* v. *Dalby*, 16 D.L.R. 710, was pressed upon us. There the McLaughlin company, the manufacturers of a motor car, had made a conditional sale of it to one Adams, the property remaining in the company until payment (p. 70). Dalby was an employee of Adams, and caused damage to the plaintiff by his negligence in managing the car. The sole question in the appeal was, whether the McLaughlin company was "the owner" of the car, under 2 Geo. V. ch. 48, sec. 19 (R.S.O. 1914, ch. 207, sec. 19); and the Court held that it was not "the owner" for the purposes of the Act, although technically and legally the owner. Anything else was obiter. The Court did not, as it could not, overrule *Lowry* v. *Thompson*, which indeed does not seem to have been brought to its attention.

Any possible doubt as to the intention of the Legislature in the legislation of 1912 to make the owner liable, as I have indicated, is, I think, removed by the Act of 1914, 4 Geo. V. ch. 36, sec. 3, which was passed in case of the proprietor, not to impose a new burden upon him. It was passed in the view that the owner was liable for the negligence of any one in charge of his car, and was intended to except the case of the car being in the possession of a thief, unless that thief should be in the owner's employ.

If the car now is in the possession of one who has taken it not larcenously, but by way of civil trespass, the owner is clearly liable. Were that not the law before the passing of this Act, we should have the extraordinary case of a liability being imposed by a clause added to introduce an exception. There can, I think, be no doubt that the Legislature by this legislation has said that without it there would have been a liability; and the addition of the excepting clause does not and cannot impose a liability not imposed by that from which it is an exception.

To give full effect to the decisions, we must hold that, while the owner was not, before the Act, liable for the negligence of a thief, he was for that of a mere wrongdoer, a civil trespasser.

Here there can be no pretence that there was a crime com-

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mitted. To constitute larceny at the common law, the *animus furandi* must be present: Russell on Crimes and Misdemeanours, vol. 2, p. 1177. Our statute puts it (Criminal Code, sec. 347): "Stealing is the act of fraudulently and without colour of right taking," etc. No *animus furandi* is possible under the facts of this case, any more than in the case of the "joy-riding" chauffeur of Mr. Thompson; and the taking was not fraudulent —there was no "intent to steal" the motor: sec. 347 (2) of the Code.

I think, therefore, that the appeal fails and must be dismissed with costs.

Falconbridge, C.J.K.B.
Latchford, J.

FALCONBRIDGE, C.J.K.B.:—I agree in the result.

LATCHFORD, J.:—By sec. 19 of the Motor Vehicles Act, 2 Geo. V. ch. 48, in force on the 30th November, 1913, the date of the accident to the plaintiffs, the owner of a motor vehicle is declared to be responsible "for any violation of this Act." An amendment which came into force on the 1st May, 1914 (4 Geo. V. ch. 36, sec. 3), relieved the owner from liability if the vehicle at the time of the violation was in the possession of a person, not being in the employ of the owner, who had stolen it from the owner.

The car which collided with the plaintiff was owned by the appellant John Whalen, who had left it at Fisher's garage, where Smith, the driver of the car at the time of the accident, was employed. The owner's purpose in leaving his car at the garage is not very clear. Smith said the car was "kept," "at times," at the Fisher garage. He thought it was what is known as a demonstrating car, that is, one used to impress favourably a possible purchaser: evidence, p. 25. He evaded a question as to whether he had ever driven the owner, and said he did not drive him around as an employee, but admitted having been to Whalen's house and bringing the car back to the garage. He stated that he had driven Mrs. Whalen "on half a dozen occasions." Whalen did not, Smith says, know that he had the car out on the day of the accident—"he left it only for repairs."

Fisher said that he was not the owner of the garage, but "was running it." Mr. Whalen did not know that Smith had taken the car out. Fisher did not think he had the right to use

the car. He had not said so upon his examination for discovery: evidence, pp. 36, 37. The second page of that examination is certified by the trial Judge to have been put in at the trial "as part of the cross-examination of the defendant W. J. Fisher." As cross-examination it is evidence, not only against Fisher himself, but against Whalen. Fisher, according to the extract so certified, was asked, "Was it (the car) in for repairs?" and answered: "No, sir. It was there in this way. There had been some work done on it; and, as he had no place to put it, he left it with us. As it was a demonstrating car, we used it. Our own car got stuck out at the Diamond, and we went to get it." "Q. Mr. Whalen knows that you used that car? A. I believe he did." Fisher was then asked (p. 37): "What do you say as regards that part of your examination for discovery? A. I don't remember anything about it. Q. Which is the correct statement, the one you make now or the one you made at the examination for discovery? A. I don't remember anything about the other one." He added, in answer to Mr. Whalen's counsel, that "there was no arrangement to use the car as a demonstrating car."

Mr. Whalen was not called as a witness, and there is no evidence other than what I have quoted as to the circumstances under which his car was kept and used in the Fisher garage. There is no finding on the point by the trial Judge. Certain inferences may, however, be deduced with reason from the evidence—meagre and unsatisfactory as that undoubtedly is. The car was kept at Fisher's for the convenience of Mr. Whalen, who had no garage at his residence. While there, it was driven by Smith from the Whalen residence to the garage on at least one occasion, and on several occasions Smith acted as chauffeur while Mrs. Whalen rode in the car. Smith was not, however, employed by Whalen or Mrs. Whalen, but by Fisher. The car, at the time of the accident, was being used by Smith upon Fisher's business without Whalen's knowledge.

I think that Mr. Whalen was rightly held liable for the damage caused by his car. The car, though used by Smith without the owner's knowledge, was not stolen by Smith. At most it was a wrongful taking out of the car upon his master's business.

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The cases pressed upon our attention do not apply in the circumstances of this case. The statute imposes upon the owner of a car a liability for its misuse.

In the light of the distinguishing facts of the case at bar, it seems to me quite unnecessary to attempt to reconcile the cases of *Lowry* v. *Thompson* and *Cillis* v. *Oakley*. It is worthy of observation that it was while the latter case was standing for judgment (the 1st May, 1914), that the Legislature passed the statute relieving the owner of a car from liability when, and only when, at the time of the violation, the car "was in the possession of a person, not being in the employ of the owner, who had stolen it from the owner."

"Owner" is not to be understood in its strict or technical sense. It means in the statute the actual owner—the person who has the right of dominion over the car: *Wynne* v. *Dalby*, 16 D.L.R. 710, 31 O.L.R. 67.

Upon such persons, the Legislature, in its wisdom, has imposed an onerous responsibility. The purpose of the legislation is plain. Motor vehicles are dangerous machines in general use on streets and roads throughout the Province. They may be and often are put in rapid and destructive motion by persons not their owners, who, having nothing to lose, are indifferent or contemptuous regarding the rights of others lawfully using the same highway. In every such case unless the car has been stolen from the owner by one not an employee, the owner is made liable for the consequences resulting from the misuse of his car.

By keeping his car at the Fisher garage—whether for his own purpose or Fisher's matters not—Mr. Whalen afforded Fisher and his employee a means of causing the damages sustained by the plaintiffs. For this the statute makes him liable.

I, therefore, think the appeal of the defendant Whalen should be dismissed with costs.

Kelly, J.

KELLY, J.:—In the evening of the 30th November, 1913, a buggy in which the plaintiffs were driving, on Court street, in the city of Port Arthur, was run into by a motor car owned by the defendant Whalen and driven by the defendant Smith.

Smith was the servant of the defendant Fisher, who, as he himself says, was "running the garage" in which the motor car was then being kept, it having been placed there by Whalen. For what purpose it was there is not made quite clear; but there is evidence that it was kept there at times; it seems to have been there at this time either for the purpose of being repaired or to be cared for or kept for the defendant Whalen, who was then absent from Port Arthur, and had no knowledge of the car being out of the garage when the accident happened. Smith, in the course of his employment by Fisher, took the car from the garage to bring in Fisher's car, which had broken down in another part of the city. Smith says he thought this car was a demonstrating car—an expression the meaning of which is given by Fisher as "a car that is kept for shewing it off to prospective buyers." Smith's further evidence is, in answer to a question as to whether he had ever driven the defendant Whalen, that he had been to his house and brought the car back, and that he had driven Mrs. Whalen on half a dozen occasions; and he adds that Whalen was in the habit of having the car taken to the garage to be repaired. The action was tried before the Senior Judge of the District Court of the District of Thunder Bay, without a jury, who gave judgment in favour of the plaintiffs for $500 and costs against all the defendants, with relief over in the defendant Whalen's favour against his co-defendants, for whatever amount he might be compelled to pay for damages or costs. The learned Judge's decision as to Whalen's liability at law was given after deliberation, and a consideration of the law.

The present appeal is by Whalen only, the other defendants having failed to prosecute their appeal, of which they had given notice.

The one question to be determined is, whether, in the circumstances, the appellant can be held liable for what took place. The statutory provision in force at the time of the accident relating to the liability of the owner of a motor vehicle is 2 Geo. V. ch. 48, sec. 19, as follows: "The owner of a motor vehicle shall be responsible for any violation of this Act or of any regulation prescribed by the Lieutenant-Governor in Council." This is a far-reaching provision and imposes grave responsi-

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bility upon an owner. It has been under review in our Courts in more than one case, to define the limit of liability, as well as to determine the meaning of the word "owner."

In *Wynne* v. *Dalby*, 16 D.L.R. 710, the main question at issue in appeal was, whether the word "owner" included a manufacturer who, in his contract for sale of a motor car on periodical payments, reserved ownership to himself until payment in full, but who on the making of the contract delivered the car to the purchaser, who operated it for his own use and benefit, and whose servant caused injury to the plaintiff, for the consequences of which it was sought to hold the vendor liable as owner. The Court there drew a distinction in favour of the vendor, expressing the opinion that sec. 19 could not have been intended to fix the very serious responsibility which the section imposes, upon one who, at the time the accident happened, had neither the possession nor the dominion over the vehicle. "Dominion," in the light of that decision, is an important element in determining where liability lies.

The appellant is far from occupying the position held by the vendor in that case. At the time of the occurrence he was undoubtedly the real owner of the car. Not only was he the owner, but he retained that dominion over it which left the control and direction of it in himself and his authorised agents. It was by his voluntary act that his vehicle was in Fisher's possession; he chose the latter as its custodian, whether for the purpose of being repaired or to be cared for, it matters not; and, by so doing, he put it in the power of Fisher and his servants so to use it, or misuse it, as to cause injury to others under such conditions as would render an owner liable except in cases where he could escape liability by reason of the car having been stolen. What would have been the result had the appellant given to Fisher for a limited time all the rights of ownership, as referred to by Lord Herschell in *Baumwell Manufactur von Carl Scheibler* v. *Furness*, [1893] A.C. 8, it is unnecessary to discuss. There is no evidence of any granting of such limited ownership.

Argument was directed to the effect of the decision in appeal in *Lowry* v. *Thompson*, 15 D.L.R. 463, and *Cillis* v. *Oakley*, 20

D.L.R. 550. I think the present case is to be decided without necessarily invoking the aid of these cases; for it is not clear on the evidence that the appellant had not some knowledge that Fisher might use the car, or at least that he did not expect or that he had no reason to expect that he would use it. In these circumstances, stealing or theft there was not, in the sense contemplated by these decisions, or in the sense of the amendment made to sec. 19 by 4 Geo. V. ch. 36, sec. 3, passed after this cause of action arose. That amendment declares that the owner is not liable where, at the time of the violation of the Act, the motor vehicle was in the possession of a person, not being in the employ of the owner, who had stolen it from the owner.

Serious as this application of sec. 19 may seem, I am of opinion that it applies so as to render the appellant liable, in the circumstances here presented. The Legislature's evident aim was to place responsibility where it would be effective, by casting the burden of ensuring safety, so far as possible, against the careless driving of reckless and irresponsible persons, upon the owner who retains dominion over the vehicle, and who has it in his power to choose the person to whom he entrusts it.

*Appeal dismissed.*

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## PAQUET v. PLANTE.



*Quebec Court of King's Bench, Appeal Side, Sir Horace Archambeault, C.J., Lavergne, Cross, Carroll, and Gervais, JJ.*

MUNICIPAL CORPORATIONS (§ II D—114*b*)—LICENSE—CERTIFICATE CONFIRMING—REVOCATION.

The Municipal Council, in confirming a certificate for the issue of a license, exercises judicial and administrative functions which the law declares to be final, and therefore the confirmation cannot subsequently be revoked.

Statement

APPEAL from a judgment of the Superior Court.

*Bureau, Bigue & Lajoie*, for appellant.

*Tessier & Lacoursière*, for respondent.

The judgment of the Court was delivered by

Lavergne, J.

LAVERGNE, J.:—The appellant has complied with all the formalities required to obtain his license certificate. The certificate was regularly approved and confirmed. The resolution of April 9, 1913, by which the Council of the town of La Tuque professed to revoke this certificate, alleges that it was duly confirmed at the sitting on April 7.

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There is, then, no doubt as to this fact: the certificate was approved and confirmed at the sitting on April 7.

The law declares that the decision of the Council approving such certificate for the issue of a license is a final decision. There is really only one question in this cause, namely, whether or not this decision of the Council can be revoked. I do not think so.

In the confirmation of such a certificate the Council exercises judicial and administrative functions. It is not the case of the adoption of a by-law or of a resolution in the ordinary course of municipal affairs, nor of the passing of a contract; it is, as I would say, a judicial and administrative decision under a text of the law, which decision the law declares final, excluding, in consequence, the revocation of this confirmation.

The last resolution of the Council formally declares that the certificate was granted and confirmed. It is not claimed that after this confirmation the appellant became ineligible to obtain his license. I have mentioned the reasons of the resolution of April 9 which professes to annul the confirmation of this certificate, and it is useless to discuss these reasons; they are absolutely illegal from the point of view of authorizing the Council of the *mis-en-cause* to recede from its first decision.

The judgment in first instance, as I have said, was rendered on March 2. It is true that the year for which the appellant should have his license was well advanced, but it had not expired, and the appeal was justified.

The respondents have all concurred in the same defence, and it should be expressly declared that the respondents Plante and Trembly should be obliged to sign the certificate of the appellant and deliver it to him.

The complaint of the appellant is thus well founded, and, now that the year has completely expired, whatever may be the advantage to the appellant in obtaining the certificate in question, he was none the less justified in taking the proceedings which he did take, even though the result may be that he obtains nothing more substantial than the payment of his costs.

I am, therefore, of opinion that the judgment of first instance should be reversed; that the certificate demanded by the appellant should be issued to him; that the resolution of April 9, 1913, should be annulled, and that the respondent should be condemned to payment of all the costs as well in first instance as in appeal. *Appeal allowed.*

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*Alberta Supreme Court, Harvey, C.J., Scott and Stuart, JJ. May 4, 1915.*

1. EVIDENCE (§ IV D—405)—DOCUMENTARY EVIDENCE—OFFICIAL RECORDS OF SURETY COMPANY—ADMISSIBILITY IN ACTION ON BOND.

Official books and reports which the official is bound to furnish as one of the duties incidental to his office are presumptive evidence against his sureties as such officer in an action under their bond that he should well and truly account for and pay over the moneys coming to his hands in his official capacity.

[*Abbeyleix Guardians* v. *Sutcliffe*, 26 L.R. Ir. 332; *Ferrie* v. *Jones*, 8 U.C.Q.B. 192; *Middlefield* v. *Gould*, 10 U.C.C.P. 9; *Welland* v. *Brown*, 4 Ont. R. 217, referred to.]

Statement

APPEAL from the judgment of Taylor, District Court Judge.

*Watt & Watt*, for plaintiffs, appellants.

*J. R. Lavell* and *Hyndman & Co.*, for defendants, respondents.

Harvey, C.J.

HARVEY, C.J.:—I agree with my brother Scott both in his conclusions and the reasons, but I wish to guard against the inference that I might not rest the conclusion on broader grounds if necessary. There appears to me much to be said in favour of the view that unless the books may be used in evidence the security is no security but a mere sham. The books of the treasurer are not required merely for the purpose of shewing receipts by the treasurer. That might be proved by other evidence, but that would not carry the plaintiff very far. The Court will not assume that because the treasurer has received money he has misappropriated it. If the books containing his own accounts cannot be used to make out a *primâ facie* case the plaintiffs would be called on to prove a negative, namely, that these moneys had not been used in a proper way. The evidence the plaintiffs need from the books is more what it does not contain in the way of entries of expenditure or what it does contain which can be shewn to be erroneous. It is difficult to see how without the evidence of the books such a *primâ facie* case can be made out and it seems absurd to say that the plaintiffs must rely on the sworn evidence of the treasurer who is alleged to be a defaulter to prove from him his own default.

Grounds on which such books should be considered good evidence against sureties on a broader principle are given in *Abbeyleix Guardians* v. *Sutcliffe*, 26 L.R. Ir. 322, and Wigmore on Evidence, para. 1077.

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SCOTT, J.:—These actions are consolidated and this appeal is taken from the judgment of Taylor, D.C.J., in favour of the several defendants with costs.

The actions are brought upon bonds given to the plaintiffs by the several defendants and one Frank J. Nicholls, the treasurer of the school district, the condition of the bonds being that

if the above bounden Frank J. Nicholls, his heirs, executors, or administrators do and shall well and truly account for and pay over to the person or persons entitled thereto all moneys coming into his hands as such treasurer without any deductions, defalcations or abatement.

the bonds should be void and of no effect.

At the trial the plaintiffs tendered in evidence the cash books of the school district kept by Nicholls as treasurer thereof during the years 1906, 1907 and 1908, being the period covered by the bonds. The reception of these books as evidence was objected to by counsel for the defendants. The trial Judge sustained the objection and refused to admit them and his refusal constitutes the ground of this appeal.

It was admitted at the trial by counsel for the plaintiffs that Nicholls was then alive and was residing in British Columbia.

To the general rule that statements or admissions made by a principal are not admissible in evidence against his sureties there are some exceptions. Among the exceptions are the rules that entries made by a deceased person against his interest (*Higham* v. *Ridgways* (1808), 103 E.R. 717), and contemporaneous entries made by a deceased person of an act which he has done and returns it in the course of his business (*Price* v. *Lord Torrington*, 91 E.R. 252) are receivable in evidence. These are well established principles of general application (see *Sturla* v. *Freccia*, 5 A.C. 623, at 640).

*Goss* v. *Wallington* (1822), 129 E.R. 1233, was an action against the sureties of a deceased collector of taxes. The bond was conditioned that the collector should, among other things, at any time when required by the obligee render a perfect account in writing of his collection and receipt of the taxes and should deliver up all the books and accounts entrusted to his care as collector and receiver. In delivering the judgment Dallas, C.J., says:—

It is clear, therefore, that the defendant's obligation is, among other

things, for the due delivery of these books, which are referred to in the condition of the bond as public books (it being there stated that they were entrusted to him and are to be delivered over to his successor) and thereby become evidence against him. On this ground we think that the marks made by Watts (the principal) ticking off the persons assessed are as an entry in a public book, evidence against the surety in this case.

In *Whitnash* v. *George* (1828), 108 E.R. 1149, which also was an action against the sureties of a deceased principal. Lord Tenterden says:—

I think those entries whereby he (the principal) charged himself with sums of money as having been received by him from the plaintiffs, were admissible in evidence against the defendants in an action on the bond, whereby they became bound that he should faithfully discharge his duties as clerk. It is part of the duty of a banker's clerk to make entries (in the books kept by him) of all sums of money received by him for his employers. Such entries made by the clerk must, as against his sureties who contracted for the faithful discharge of his duty, be taken *primâ facie* to have been made by him in discharge of that duty.

In both these cases the entries made by the deceased principals were clearly admissible against the sureties on the ground that they were entries made by the deceased principals against their interest and, such being the case, the views expressed in the judgment I have quoted appear to be intended to be applicable as well to cases where the principals were still living.

Bayley, J., in his judgment in the latter case says:—

The foundation of the decision in *Goss* v. *Wallington*, 3 B. & B. 132, was that the entries made by the collector were admissible, not merely as a declaration made by him against his interest, but on the ground that they were entries in those very books which, by the condition of the bond, the principal was bound faithfully to keep. The entries were evidence against the surety because they were made by the collector in pursuance of the stipulations contained in the condition of the bond.

In *Ferrie* v. *Jones*, 8 U.C.R. 192, Robinson, C.J., who dissented from the majority of the Court in commenting upon the judgment in *Goss* v. *Wallington*, *supra*, and *Whitnash* v. *George*, *supra*, expresses the view that they were not founded on the fact that the principal was dead, but in the first case on the fact that the books kept by him were public books, and, in the second place, that the books sought to be put in evidence were books kept by him in the discharge of his duties for the discharge of which the sureties had bound themselves.

In *Middlefield* v. *Gould* (1860), 10 U.C.C.P. 9, it was held that entries made by a Clerk of a Division Court in the course of

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his business in books kept under the provisions of an Act for that purpose were evidence against the surety in an action brought against him to recover moneys received by him as such clerk.

Richards, J., who delivered the judgment of the Court, says, at p. 14:—

In the case before us the entries were made by the clerk from day to day in the discharge of the duties of his office and the statutes under which he was appointed requires the making of such entries. On general principles, therefore, I am of opinion that the entries so made can be received in evidence against the defendants. I think the book in which these entries were made comes fairly within the class of books referred to by Mr. Taylor in his work on Evidence (sec. 1429) as kept by persons in a public office in which they are required, whether by statute or by the nature of their office, to write down particular transactions occurring in the course of their public duties and under their personal observation.

The report in that case does not shew whether the principal was living or dead at the time of the trial, but the language of Richards, J., implies that that question was not material as, in case he was not living the entries of the principal in the books of moneys received by him, would be receivable against the sureties upon an entirely different and well-established principle, viz: that they were entries made by a deceased person against his interest.

In *Victoria Mutual* v. *Davidson* (1883), 3 O.R. 378, Burton, J., in his judgment at the trial questions the correctness of the view expressed by Robinson, C.J., in *Ferrie* v. *Jones, supra*, and by Richards, J., in *Middleton* v. *Gould, supra*, but treated the judgment in the latter case as binding upon him.

In *Welland* v. *Brown* (1883), 4 O.R. 217, Rose, J., at 222, quotes with approval and follows the judgment of Richards, J., in *Middlefield* v. *Gould*.

In *Guardians of Abbeyleix* v. *Sutcliffe* (1890), 26 L.R. Ir. 332, which was an action against the sureties of a collector of taxes who had absconded but who, as the judgment states, was possibly available as a witness, it was held that the entries made by him in the accounts kept by him as such collector were admissible as evidence against the sureties.

Gibson, J., at page 335:—

The point which we have to determine is whether entries in books kept in due discharge of duty guaranteed by the sureties constitutes, as against

such sureties, *primâ facie* evidence. The point has not been the subject of decision. It lies outside the authorities in reference to business entries in course of duty or entries against interest in each of which cases the death of the person whose entry is offered, is a condition precedent to the admissibility of the evidence. . . . The utmost that can be said is that some of the cases (*e.g.*, *Goss* v. *Waddington*) where the Court received the evidence, expressions occur which seem to hint at the decision being founded not so much on the principle of *Price* v. *Torrington*, 91 E.R. 252, and *Higham* v. *Ridgways*, 103 E.R. 717, as on special considerations connected with the effect of the contract of guarantee.

He then quotes from Phillips on Evidence in which, after stating the general rule, the author states that the surety "may be affected by declaration or statements made by the principal, when they are connected with the business in respect of which the surety becomes bound and are made by the principal at the time of transacting the business," from Taylor on Evidence and De Colyar on Guarantees, and other authorities, and states:—

These references shew that the principle now contended for by the plaintiffs has not been invented for the first time for the purposes of this case, but has for some time been present to the mind of the profession.

Holmes, J., in his judgment, at p. 336, says:—

The point which we are called upon to decide in this case, although it has been referred to by text writers and discussed in the judgments of distinguished Judges has not yet been, I think, the subject of authoritative discussion. A person contracts that another will faithfully perform the duties of an office to which he is appointed and that he will keep correct account of the moneys received by him in the discharge of those duties in certain books. The question is whether the entries of receipts made by such officer in the books referred to in the contract are evidence against the surety in an action brought for breach thereof. Neither the principle of *Higham* v. *Ridgways*, nor that of *Price* v. *Lord Torrington* applies; for, in the present case the officer who made the entries is living, and possibly, available as a witness. Is there then any other legal principle upon which the admission of the entries can be supported. There would, I presume, be no doubt that, if it were proved that, after the entries had been made, the defendant had stated that he did not question them, or that he was satisfied of their correctness, they could be used against him as evidence that the sums had been actually received. They would not, of course, be conclusive evidence of such receipt as against him any more than they would be conclusive as against the person who made them, but they would be evidence on which a jury would be at liberty to act. This is not, indeed, the present case, but is there any material difference? It is part of the very contract sued on that the accounts kept by the officer will be correct; and it is at least reasonable that, under such circumstances, the person to whom this guaranty was given should be at liberty to rely upon the correctness of the accounts thus guaranteed. I can find no authority inconsistent with this view and in two or three of the cases quoted the Judges

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have, I think, recognized it as a reason for admitting the evidence, although the decisions might have been supported on other grounds.

In Taylor on Evidence, 10th ed. (1906), par. 785, the following is stated:—

> The admissions of a *principal* can sometimes (though only seldom) be received as evidence in an action *against the surety* upon his collateral undertaking. In such cases, if the declarations of the principal were so made during the transaction of the business for which surety was bound as to become part of the *res gestæ*, they, as such, are admissible.

And in De Colyar on Guarantees, 3rd ed., at p. 208:—

> But official books and reports which the official is bound to furnish as one of the duties incidental to his office are, in Ireland and America and, therefore, presumably in England also, presumptive evidence against him and his sureties.

Sub-sec. 4 of sec. 49 of the School Ordinance (C.O., ch. 75), provides that it shall be the duty of the treasurer of the Board to keep in a cash book provided for the purpose a complete and detailed record of all moneys received and disbursed for school purposes.

The books tendered as evidence in the present case are undoubtedly books which were kept by the principal in pursuance of the statute referred to. The obligation of the sureties is merely that he should well and truly account for and pay over the moneys received by him as treasurer, and it may be open to question whether the accounting for which they are sureties implies the entries in the cash book of all moneys received by him, but, apart from that question, it appears to me to be a reasonable deduction from the cases I have referred to that they must be deemed to be public books and that, as such, the entries made by Nicholls therein should be received as *primâ facie* evidence against the defendants.

I would allow the appeal with costs and direct a new trial and that the costs of the former trial abide the event of the new trial.

Stuart, J.

STUART, J.:—The bond in this case was upon the condition that the treasurer

> do and shall well and truly account for and pay over to the person or persons entitled thereto all moneys coming into his hands as such treasurer.

Much stress was laid in the respondent's argument upon the point that this condition did not bind the treasurer to keep correct books. I am unable to see the force of this argument. It

seems to me to rest upon a misconception of the point in issue. The condition was that the treasurer should *account* for the moneys. I find in Murray's Dictionary that one meaning of the word account is "to give a particular statement of the administration of a trust." Certainly the condition of the bond was that the treasurer should tell in detail what moneys he had received. To account for money coming into his hands means quite clearly something more than to pay over for the bond reads "account for *and* pay over." It is true that the condition may not have been that he should enter his statements in a book in a written form. But certainly it was that he should make a statement at least verbal, of what he had received. If he was so confident of his memory that he did not need to write things down then he was certainly bound to, under the obligation of this bond, to tell verbally what items of money he had received. And the position on this appeal is exactly the same in my opinion as if Nicholls had made a number of verbal admissions to the trustees that at various dates he had received certain various sums of money from various sources. The obligation was that he should "*well and truly*" do that. The objection to the admissibility in evidence of his written admissions must rest upon the same ground exactly as an objection to the admissibility of such verbal statements as I refer to. I can see no reason why such verbal statements should be excluded as against the sureties. They became bound in a penalty at least that his verbal statements, even if he had never made any written one, should be "well and truly" made. A statement, either verbal or written, is the only way in which an account can be given. Having bound themselves that his statements, however made, should be well and truly made I am quite unable to see why the statements he did make, supposing them to have been verbal only, could be objected to by the sureties. Those are the very things of which they undertook to guarantee the truth. And if this be so as to verbal statements there can be no difference in principle where the statements have been made in writing. For these reasons and also for the reasons given by my brother Scott in which I fully concur, I would allow the appeal. *Appeal allowed.*

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K. B.

## MARTINEAU v. PENNINGTON.

*Quebec Court of King's Bench, Appeal side, Sir Horace Archambeault, C.J., Lavergne, Cross, Carroll, and Gervais, JJ.*

1. MORTGAGE (§ IV—50)—ASSIGNMENT — SUBSTITUTION — NO NEW DEBT CREATED—RIGHTS OF PARTIES.

The registration of the transfer of a debt has not the effect of creating the hypothec different from that created by the deeds of obligation, but simply substitutes new creditors for the former ones; therefore, if injured in any way the debtor is not entitled to attack the deed of transfer but should attack the deeds of original obligation.

Statement

THE judgment of the Superior Court, which is confirmed, was rendered by Malouin, J., November 4, 1913. There were two similar causes which were decided at the same time and in the same manner. The Bank of Nova Scotia is *mis-en-cause* in the second action.

On August 30, 1910, by deed of obligation before the notary Allaire the appellant acknowledged that she owed to the *mis-en-cause* a sum of $10,000, which they had lent and advanced to her. To secure the repayment of this amount within 3 years from the date of the deed the appellant hypothecated to the lenders certain immoveables to the value of this sum of $10,000.

On July 12, 1911, the appellant agreed to give to the same creditors a new *hypothec* for $10,000 upon the immoveables already hypothecated by the above mentioned deed.

By deed of conveyance of March 14, 1913, before the notary Couture the *mis-en-cause* had assigned to the respondent with legal warranty the sum of $20,000 or whatever balance of this sum remained due to them with interest upon said sum or upon the balance remaining due by the appellant under the two above mentioned deeds.

The assignors conveyed to the assignee all their rights and interest in these sums subrogating and substituting the assignee in all their rights, titles, privileges and *hypothecs* against Dame Aurèlie Martineau and upon the properties described in the said deeds.

On March 29, 1913, by deed before the notary Couture the respondent transferred to the respondent in the second cause, the Bank of Nova Scotia, the same debt acquired as aforesaid from the *mis-en-cause;* the second transfer is made in the same terms as the first and refers particularly to the deeds above mentioned executed by the appellant in favour of the *mis-en-*

*cause*. The appellant has sued Pennington and the bank by two separate actions.

She alleges in each of these actions that she never agreed in favour of the respondents nor in favour of their *auteurs* to a *hypothec* or an obligation of $20,000; that the sole obligation that she had entered into was one of $10,000 in favour of the *mis-en-cause*, which obligation of $10,000 is guaranteed by the *hypothecs* mentioned in the deeds above referred to.

In each of these actions the conclusions of the plaintiff were that by the judgment on the intervention the *hypothec* of $20,000 having affected the immoveables of the plaintiff by virtue of the deeds of transfer above mentioned should be declared null and non-existent for all legal purposes and that the radiation of its registry should in consequence be ordered.

The respondent in each case pleaded in denial of the allegations of the appellant that her immoveables were affected by a *hypothec* of $20,000 resulting from the registration of the deed of transfer and in alleging that the plaintiff had executed the two *hypothecs* above mentioned the guarantee advances made to here to the amount of $16,000.22; that this debt thus guaranteed had been transferred to the respondent and that the appellant could not obtain radiation of these two *hypothecs* so long as she had not discharged the principle debt.

The action was dismissed by the Superior Court and this judgment was confirmed by the Court of Appeal.

*Turgeon & Roy*, for plaintiff.

*Choquette & Galipeault*, for defendant.

*Pentland & Stuart*, for the *mis-en-cause*.

The judgment of the Court was delivered by

LAVERGNE, J.:—I am of opinion with the Judge of first instance that no *hypothec* was created by the transfers in question and their registration; that the *hypothec* which might exist had been created by the two deeds of obligation above described, the one passed August 30, 1910, and the other July 12, 1911. Lavergne, J.

The registration of the transfer of a debt has not the effect of creating the *hypothec* different from that created by the deeds of obligation. It is a debt that the assignors have trans-

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ferred to the assignee with its accessories, privileges and *hypothecs*, which *hypothecs* are only specially mentioned in this assignment by reference to these deeds of obligation in a most special manner and by giving the date, the amounts, the names of the notaries and the date of their registration. The transfer in the present case is an ordinary transfer of a debt substituting the transferee in all the rights of the transferors and nothing more and creating no additional *hypothec*. If the appellant was injured in any way she could attack the deeds of obligation in question, but not the deed of transfer which merely refers to the deeds of obligation and does not in any manner change the nature of the obligation or of the *hypothec* which might exist in virtue of the said deed.

I do not believe that we are called upon to examine any other question. The transfers of which I have spoken do not constitute a *hypothec* and have not changed the position of the appellant from this point of view; they have simply substituted for her former creditors the new creditors.

The two actions in question are, therefore, not well founded and the two judgments dismissing the actions of the appellant should be affirmed with costs. *Appeal dismissed.*

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S. C.

## MORRISBURGH AND OTTAWA ELECTRIC R. CO. v. O'CONNOR.

*Ontario Supreme Court, Appellate Division, Falconbridge, C.J.K.B., Hodgins, J.A., and Riddell, and Latchford, JJ. June 7, 1915.*

1. CORPORATIONS AND COMPANIES (§ V B 1—175)—STOCK SUBSCRIPTIONS—SUBSCRIPTION VOIDABLE—RIGHT TO REPUDIATE—LACHES.

The right to repudiate a subscription for shares on account of misrepresentation or because of non-delivery of a copy of the prospectus as required by the Ontario Companies Act (6 Edw. VII. ch. 27, sec. 3), must be exercised promptly and will not be accepted as a defence where there has been unreasonable delay in approving or repudiating.

Statement

APPEALS by the defendants from the judgment of the County Court in favour of the plaintiffs.

*Montague G. Powell*, for appellants.

*G. D. Kelley*, for plaintiffs, respondents.

Riddell, J.

RIDDELL, J.:—The plaintiffs, an electric railway company, brought eleven actions in the County Court of the County of Carleton for the amount of calls on the capital stock—the defences were in substance two, misrepresentation in procuring subscriptions and non-delivery before subscription of a

prospectus. His Honour Judge O'Reilly, sitting for the Judge of that County Court, gave judgment in favour of the plaintiffs, and ten appeals were taken to this Court. All the appeals were argued together: the defendants' counsel admitted that he could not succeed on the ground of misrepresentation, and the cases turned on the second ground of defence.

The defendants relied on sec. 3(3) of an Act respecting Prospectuses issued by Companies, 6 Edw. VII. ch. 27 (O.): "No subscription for stock . . . induced or obtained by verbal representations, shall be binding upon the subscriber, unless prior to his so subscribing he shall have received a copy of the prospectus."

Assuming this statute to be in full force and not modified by subsequent legislation, we dismissed nine of the appeals, the defendants having, with full knowledge of the facts, ratified their positions of shareholders, by acting as directors, attending meetings of shareholders, giving proxies, paying calls on the stock, or the like unequivocal acts—we considered that the most the Act could effect would be to wipe out the subscription altogether, and that if the subscriber himself, with full knowledge of the facts, took the position of shareholder, he was a shareholder. *Quilibet renunciare potest lege pro se introducto.*

O'Connor's case we reserved, and it is now to be decided.

O'Connor is a real estate agent: he was canvassed by McFarlane, the promoter, and in March, 1911, signed a subscription list for 10 shares in the company. The subscription was accepted in June, and notice of allotment sent to and received by the defendant—he had paid $100, 10 per cent. of the face value of the stock, on subscription, but he failed to pay subsequent calls, though duly notified of such calls. A meeting of shareholders was held in July for the election of directors and general organisation—the defendant received notice of at least one meeting (he says in September), but he does not seem to have attended any or done any act which would establish his status as shareholder.

This action was brought in December, 1913: the defendant never took steps to repudiate his subscription, although he knew that he was being considered a shareholder by the company and that his name was on the list of shareholders.

The plaintiffs contend that the Act of 1906, 6 Edw. VII. ch.

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27, had, before the transactions in question, been repealed by the Ontario Companies Act of 1907, 7 Edw. VII. ch. 34, and that sec. 210 of this Act relieves them of the necessity of delivering a prospectus. In view of the language of sec. 3 of this Act, and of the fact that the statute of 1906 is omitted in schedule E, this repeal by implication may be doubtful. But there is a sound reason why this defence should not succeed.

The defendant allowed his name to be on the list of shareholders for two years and more, without objection, and I think he cannot be relieved now.

The rule in regard to voidable not void subscriptions is, that the right to avoid must, if exercised at all, be exercised promptly on discovering the facts. "For his name being on the register, he is held out to the public as a member, and persons may be induced to act on the faith of his membership: *Oakes* v. *Turquand* (1867), L.R 2 H.L. 325:" Palmer's Company Precedents, 11th ed., p. 197. The cases given in Palmer, pp. 196, 197, are uniform in this direction.

In *Carrique* v. *Catts*, 20 D.L.R. 737, I thought that this principle should be extended to a proposed "syndicate"—the majority of the Court did not apply the principle in that particular case, but expressed no opinion adverse to its complete acceptance in the case of a company.

The cases are, it is true, cases of subscription obtained by misrepresentation; but they are decided on the fact that such a subscription is voidable only—that it is voidable by reason of misrepresentation is immaterial, it is the voidability of the contract which is material.

In the present case, there is no statutory prohibition against a company procuring subscriptions without the prior delivery of a prospectus so as to render such a subscription void as being in contravention of a statute—all that is done is to provide that a company procuring a subscription in that way does so at its own peril—the subscriber is not bound, but may elect to approve or disaffirm—in short, the contract is voidable and not void. It is wholly immaterial on what ground or for what reason it is voidable—the important matter is that it is so.

I think this appeal should be dismissed with costs.

Falconbridge, C.J.K.B. Latchford, J. Hodgins, J.A.

FALCONBRIDGE, C.J.K.B., and LATCHFORD, J., concurred.

HODGINS, J.A., dissented. *Appeals dismissed with costs.*

## CITY OF FRASERVILLE v. BERUBE.

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K. B.

*Quebec Court of King's Bench, Appeal Side, Sir Horace Archambeault, C.J., Trenholme, Lavergne, Cross, and Roy, JJ.*

1. PUBLIC IMPROVEMENTS (§ IV—65)—MUNICIPALITY—WORKS OF PERMANENT NATURE—DAMAGE TO ADJOINING OWNER—EMINENT DOMAIN.

Where a municipality has by law the right to construct works of a permanent nature and obtain from a watercourse the necessary power to light a town, and to acquire by expropriation, land necessary for the completion of the works, it has no right to pay a yearly indemnity based on the value of the crop for damages caused by inundation of the land of an adjoining owner but must expropriate the land and pay the indemnity in advance.

Statement

APPEAL from a judgment of the Superior Court.

The city of Fraserville has constructed on Fourchue river a dam to increase the waterpower it uses in connection with the lighting of the town. That dam has raised the level of the water in the river and has inundated the land of the defendant. The result to him has been an impossibility to cultivate, and thereby he has been troubled in his possession and also has suffered damages. He now takes the city to Court, claims damages and demands that that inundation be stopped.

The appellant claims that the land of the plaintiff had always been inundated by the natural increase of the water flow; that the works done by it were in the public interests and had been made by virtue of the law and with the approval of the Government of the Province of Quebec; that it had the right to construct that dam; and that it had offered to the respondent $24 a year, an amount which he had refused. It also alleged want of having been put in default to have the amount of damages assessed by experts.

*Lapointe, Stein & Levesque*, for appellant.

*L. Bérubé*, for respondent.

The judgment of the Court was delivered by

Lavergne, J.

LAVERGNE, J.:—This action is an action for damages, and is at the same time a possessory and a petitory action. It is not contested that the construction of the dam has inundated the property of the plaintiff who has lost both of his hay crops for the summers of 1910 and 1911. The engineer says that since the construction of this dam the property of the respondent has been but a lake and that there are there permanently from 6 to 15 ft. of water, according to the level of the ground. Cultiva-

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tion of that farm has therefore become impossible. That is admitted. The value of the hay crop lost by the plaintiff, and this is admitted by the appellant, is $24 a year, which sum has been offered by the appellant and refused by the respondent. The evidence on such value is contradictory.

The Judge in the Court of first instance, after a very careful study of that evidence, came to the conclusion that he should grant $30 a year for the hay in question, *i.e.*, the sum of $60 for the two crops. I am of opinion, that his conclusion is fair and justified by the evidence, and this part of his judgment must certainly be confirmed.

The second question to be discussed is the question of the negatory action. Was the respondent justified in demanding the ceasing of the trouble complained of and that the appellant stop inundating his farm by the working of this dam? As I said above, the appellant claims the right so to do and to be authorized to it by law and by its by-laws.

The works of the appellant are of a permanent nature for the maintenance of a system of electric light, and the fact that the farm of the respondent is inundated is so to say a permanent expropriation of that farm and a taking of possession of it by the appellant. The appellant had certainly the right to construct those works, but it could not so expropriate the farm of the respondent without indemnification, and by law said indemnity must be paid in advance. Several years have now elapsed since the appellant has so deprived the respondent of his farm and it has done nothing until brought to Court to remedy such illegality.

The city had the right to proceed with such expropriation by virtue of the statutes which govern it; it admits that it had such right but claims that it was not bound to use it, and denies in a general way, the facts alleged by the respondent. As I said a few moments ago, however, it is incontestible that it is the construction of that dam and those tanks which have rendered the property of the respondent of no use; the works which it has done are of a permanent nature, and, I repeat it, constitute on the part of the appellant a taking of possession of a permanent nature; therefore it must pay for this land. If later

on, it abandons this dam and the inundation ceases, having become the proprietor of the land in question, it will have the right to re-sell it if it thinks proper. For the moment, in the circumstances I have described, it cannot be permitted to continue that illegal occupation and it cannot do so except according to the statutes which confer on it such power, that is to say, through an expropriation; it is for it to begin those procedures and not for the party expropriated.

In the absence of all proceedings by the appellant, the expropriated party is entitled to have recourse to the ordinary means granted by law and his action is well founded.

The Judge of first instance has, in his notes, cited several authorities, and the respondent in his factum has also cited a great number of them, and I refer in a special manner to the judgment and to the notes of the Judge of first instance. All other citations, I believe, are useless and could only be repetitions, and I therefore conclude that the judgment of first instance should be confirmed. *Appeal dismissed.*

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## Re HISLOP AND STRATFORD PARK BOARD.



*Ontario Supreme Court, Boyd, C. May 13, 1915*

1. INTEREST (§ I C—33)—EXPROPRIATION AWARD—TIME OF ENTRY.

The effect of sec. 347 of the Municipal Act, R.S.O. 1914, ch. 192, incorporated in the Public Parks Act, R.S.O. 1914, ch. 203, by sec. 17 of that Act, is, that where the arbitration is only as to the amount of compensation, and the expropriating by-law does not authorize permanent entry on the land, the award as to amount does not become binding on the Parks Board unless adopted by by-law within three months after the making of the award; and where possession of the land has not been taken by the Board, and no provision is made in the by-law for entry upon the land under the award, interest should not be allowed to the claimant land-owner upon the sum awarded for the value of the land.

[*Re Macpherson and City of Toronto* (1895), 26 O.R. 558, distinguished.]

2. COSTS (§ I—8)—EXPROPRIATION PROCEEDINGS—DISCRETION AS TO AWARDING.

The power conferred on arbitrators by sec. 344 of the Municipal Act, R.S.O. 1914, ch. 192, as incorporated in the Public Parks Act, R.S.O. 1914, ch. 203, to award costs as a fixed sum or on the scale of the Courts, is discretionary, which they can exercise by disallowing costs.

3. DAMAGES (§ III L 6—280)—EXPROPRIATION OF LANDS—PUBLIC PARKS—PROBABLE ADVANTAGES—VALUATION.

What is likely to be the value of lands if certain local improvements are made, which may or may not follow the acquisition of such lands for park purposes, if in their existing conditions the lands are prac-

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tically unsalable, is not to be regarded in their valuation upon an expropriation of such lands for public parks.

APPEAL from an award of arbitrators.

*T. Hislop*, for the appellants.

*R. S. Robertson*, for the Board.

BOYD, C.:—The by-law for the extension of the park system in Stratford provides that certain lands, being parts of lots 25 and 26 according to McPherson's survey and part of park lots Nos. 428 and 429 according to the description set forth, be expropriated. An award made by three arbitrators, dated the 20th April, 1915, finds that the total amount of compensation is $1,400, and directs that each party shall pay half the arbitrators' fees, and does not allow costs to either party.

Appeal is by the owners, on the ground that the compensation is insufficient, and that costs should have been given to the owners, and also interest allowed on the amount awarded for the value of the land, $1,200.

To take the last point first. Possession of the land has not been taken by the Board, and no provision is made in the by-law for entry upon the land under the award. The possession of the owners has been undisturbed, and may not be disturbed unless the Park Board determines to adopt the award within the time limited by the statute: I refer to sec. 347 of the Municipal Act, R.S.O. 1914, ch. 192, incorporated in the Public Parks Act, R.S.O. 1914, ch. 203, by sec. 17 of that Act:—

> Where the arbitration is as to compensation, if the expropriating by-law did not authorise or profess to authorise any entry on or use to be made of the land before the award, except for the purpose of survey, or if the by-law gave or professed to give such authority, but the arbitrators by their award find that it was not acted upon, the award shall not be binding on the corporation, unless it is adopted by by-law, within three months after the making of the award; and if it is not so adopted, the expropriating by-law shall be deemed to be repealed, and the corporation shall pay the costs between solicitor and client of the reference and award, and shall also pay to the owner the damages, if any, sustained by him in consequence of the passing of the by-law, and such damages if not mutually agreed upon shall be determined by arbitration.

The effect is, that where the arbitration is only as to the amount of compensation, and the by-law does not authorize permanent entry on the land, the award as to amount does not be-

come binding on the Board unless adopted by by-law within three months after the making of the award.

Having regard to the relative situations of the parties as to the enjoyment of the land, the cases as to payment of interest on the sum awarded from the date of the by-law do not appear to be applicable. The leading case as to interest on the sum awarded is *Re Macpherson and City of Toronto* (1895), 26 O.R. 558. But interest was given because the effect of the by-law was to vest immediately in the corporation the property expropriated, and, because the land was then taken possession of, an equivalent by way of interest was allowed to the owner. But where the effect of the by-law and arbitration is only to give an option to take the land at the amount awarded, the land itself is not taken or interfered with until the by-law is adopted by a further act of the Board. This is not a case in which the appellants are entitled to interest on the amount of the award, as matters now stand.

Neither should there be any interference on the question of costs unless some material variation is to be made in the amount awarded. The statute—sec. 344 of the Municipal Act—enables the arbitrators to award costs as a fixed sum or on the scale of the Courts:—

> The arbitrators may award a fixed sum for costs or may award costs on the scale of the Supreme Court, or of the County Court, in which case they shall be taxed by the proper officer of the Court in the county or district in which the first meeting of the arbitrators was held, without any further order, and the amount shall be payable within one week after it is finally determined.

This is manifestly a discretionary power, which they can well exercise by disallowing costs. The ground of decision as to this was, no doubt, the great discrepancy between what was claimed, $5,000, and the sum awarded for the land.

And upon this head of appeal—on the merits—I can find no good ground on which to reverse or to increase the amount. It was evidently a special kind of land, in part low-lying, in part wet and marshy—difficult of access—and but a small portion available for building on. The evidence is greatly divergent as to values and as to opinions of potential values—the arbitrators, who well knew the place and viewed it, struck what seems to be

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a reasonable mean between the extremes. I cannot doubt that the reclamation of this strip of land on the water front for park purposes will add to the amenity of the prospect and to the value of the lands retained by the proprietor.

There is great doubt in my mind whether the right of the owners is made out to fix the limit of their land as at the present water's edge. Many changes have been made by digging out the bed and by making dykes along the edge of the stream as it was originally, which render it difficult to define the boundaries upon the evidence before me. The high values placed on the place by the claimants' witnesses are based upon what is likely to be the value if certain local improvements were made, which may or may not follow the acquisition of the land for park purposes; but in its present situation I should deem the land to be practically unsalable.

I cannot, after reading and considering the evidence and all the plans etc. put in, find any tenable and satisfactory ground to disturb the conclusions of the arbitrators.

I dismiss the appeal with costs. *Appeal dismissed.*

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K. B.

## MARCIL v. LEGAULT.

*Quebec Court of King's Bench, Appeal Side, Sir Horace Archambeault, C.J., Trenholme, Cross, and Carroll, JJ.*

1. VENDOR AND PURCHASER (§ I E—29)—SALE OF LAND—DEFECTIVE TITLE—ANNULMENT.

A subsequent purchaser is justified in demanding the annulment of a sale where the immovable is subject to a real servitude of "*non-aedificandi*," of which he has not been informed.

2. COVENANTS AND CONDITIONS (§ II A—10)—SALE OF LAND—"FREE FROM INCUMBRANCES"—NON-APPARENT SERVITUDE—DISCLOSURE.

Where there is a clause in a deed of sale "free from incumbrances" (*franc et quitte*); the vendor is bound to disclose to the purchaser the existence of a non-apparent servitude, and cannot claim that the purchaser should have searched the records and so informed himself, but he will be excused by shewing that the purchaser knew of the servitude at the time of sale.

Statement

APPEAL from the Court of Review.

*A. P. Mathieu*, for appellant.

*Perault*, for respondent.

The defendant complains that the property sold was subject to a non-apparent servitude of "*non-aedificandi*" which the vendor had not made known to him but had always ignored. The conclusion of the declaration was that the plaintiff should

cause this servitude to disappear or that experts should determine the damages that he had suffered therefrom in order that he might be permitted to deduct the same from the price of sale.

The plaintiff replied that he had furnished all the titles to his purchaser, who, after having caused them to be examined by his notary, declared that he was satisfied; that the clause in question did not create a servitude but a personal obligation and that the defendant had never been troubled by this servitude.

Among the documents of title furnished to the purchaser was a certificate of examination by the Registrar of Deeds of his records upon which the servitude in question did not appear.

The plaintiff, after contesting the action on the merits, called in his vendor in warranty.

The Superior Court (Mercier, J.), on June 20, 1913, dismissed the main action and maintained the action in warranty. This judgment was reversed by the Court of Review (Tellier, Pouliot, and Greenshields, JJ.), on March 25, 1914 (Q.R. 45 S.C. 481).

The facts of the case and the reasoning of the Judges below will be found in this report.

The Court of Appeal reversed the judgment of the Court of Review and restored that of the Superior Court for the following reasons:—

Considering that the deed of sale sued out by the respondent, is in effect, a deed with warranty of *franc et quitte*, and binds the appellant to deliver to the respondent the property sold free of all charges;

Considering that the registrar's certificate establishes the property subject to servitude registered against the same;

Considering said registrar's certificate is sufficient evidence of the existence of such servitude registered against the said property;

Considering the decisions given by this Court in the following cases, viz.:—

*Wall* v. *Hamilton*, 24 J. 49; *Parker* v. *Halton*, 3 J. 252, 256.

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Considering that there is error in the judgment rendered by the Court of Review, at Montreal, on March 25, 1914, for the considerant aforesaid which has reversed the said judgment of the said Superior Court. *Appeal allowed.*

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## Re ONTARIO FIRE INSURANCE.

*Alberta Supreme Court, Stuart, J. May 9, 1916.*

1. CORPORATIONS AND COMPANIES (§ IV G 5—130)—STATUTORY LIABILITY OF DIRECTORS—TRANSFER OF STOCK TO PERSONS OF INSUFFICIENT MEANS.
In order to relieve directors of the liabilities imposed under sec. 24 of the Companies' Clauses Act, R.S.C. 1886, ch. 118, for allowing a transfer of unpaid stock to a person who is "not apparently of sufficient means" there must be a positive appearance of sufficient means; the directors must not approve a transfer to a person about whom they know nothing.

2. CORPORATIONS AND COMPANIES (§ VI E—341)—DISSOLUTION AND WINDING UP—POWERS OF LIQUIDATOR—STATUTORY LIABILITY OF DIRECTORS.
The burden of proof that transfers of unpaid stock were made without due information and inquiry as to the financial responsibility of the transferee is upon the liquidator where the insolvent company was by its special Act of incorporation made subject to the statutory provision that the directors should be jointly and severally liable for allowing the registration of a transfer of unpaid stock to a person not apparently of sufficient means, and the liquidator seeks to enforce that statutory liability.

Statement

APPLICATION to settle the list of contributories of a company in liquidation.

*F. Taylor*, K.C., for contributories except G. S. Ewart.

*H. P. O. Savary*, for G. S. Ewart.

*A. H. Clarke*, K.C., for the liquidators.

Stuart, J.

STUART, J.:—This is an application to settle a list of contributories, with particular reference to one class of alleged contributories, who have been for convenience referred to as *schedule A*. The list of names in this schedule consists of the names of some thirty-six persons who were at one time shareholders, but had previous to the winding-up order transferred their shares. The application is to add their names to the list of contributories in respect of the amounts still unpaid upon the shares formerly held by them.

The company was incorporated by a special Act, being 4 & 5 Edw. VII., ch. 137 (Dom.), which was assented to on May 16, 1905. The capital stock was fixed at $5,000, and the shares at $100 each.

Apparently, for a year and a half nothing was done except to secure subscriptions for stock. Then, on January 14 and 15, 1907, organization meetings of the provisional directors and of the

shareholders were held. At the meeting of the provisional directors it was reported that 3,250 shares had been allotted, and that of these Robert Thomson had taken 1,410 and Percy W. Thomson 1,410. The remaining 430 shares were distributed in small amounts among a number of persons. At the shareholders' meeting on January 15, Robert Thomson, Percy W. Thomson, J. Royden Thomson, and six other gentlemen, were elected directors. It was also decided that a contract should be entered into with William Thomson & Company, of St. John, N.B., by which that firm should agree to take the entire management of the company's business, to get 30 per cent. of the gross premium income, and pay all expenses, with certain exceptions. Then a directors' meeting was held, at which Robert Thomson was elected president and Percy W. Thomson secretary-treasurer. A contract was then entered into between the company and W. Thomson & Company upon the terms referred to in the shareholders' resolution. This contract was signed on behalf of W. Thomson & Company by Robert Thomson and Percy W. Thomson, and on behalf of the Ontario Fire Insurance Company by Robert Thomson and Percy W. Thomson. Presumably these were the same gentlemen as had signed on behalf of W. Thomson & Company.

At this meeting W. Thomson & Company were appointed chief agents for the company in Canada, in compliance with a certain provision of the Insurance Act. A shareholders' meeting was then immediately held, at which this contract was approved and confirmed. The next annual meeting of the company was held on February 19, 1908, and at a special or adjourned meeting of shareholders held on February 21, 1908, the terms of the contract with W. Thomson & Company were changed so that the latter firm were to be paid $5,000 a year, in return for which they were to "provide" a manager of the company, who was to reside in Toronto.

At a shareholders' meeting of December 17, 1908, the head office of the company was changed to St. John, N.B., at which place W. Thomson & Company carried on business as general insurance agents.

During 1909, owing to a large fire in Campbellton, fire losses to the amount of $47,120 had to be paid.

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At the annual meeting in February, 1911, Robert Thomson, Percy W. Thomson, George S. Ewart, R. S. Ewing, A. C. Heighington, Leavitt, Parker, and J. Royden Thomson, were elected directors.

At a meeting of the directors held on September 2, 1911, it was reported that five fires which had occurred had caused heavy losses, and that the Insurance Inspector was demanding that $50,000 additional capital be provided. It *was* decided to make an additional call of 5 per cent. on the shares subscribed, to be paid on October 5. A special meeting of the shareholders was called for September 25, 1911, in order to get direction as to what to do, but it was decided, "if possible, before hearing from the stockholders, to sell the company, or, failing that, to re-insure as much as could be re-insured, and cancel the balance." Such, at least, was the minute entered in the record of that meeting. On September 15 a meeting of the directors was held, at which it was reported that the business of the company at the Winnipeg, Toronto and Montreal branches had resulted in losses which amounted to about $6,000.

About September 17, 1911, a Mr. J. E. Rice, at that time managing director of the Western Canada Fire Insurance Company, with its head office in Calgary, arrived in St. John upon business connected with his own company. The Thomson Company had been doing some business for the Western Canada, whose operations had extended apparently to the Maritime Provinces. Rice met Ewing, the vice-president, and Percy W. Thomson, the secretary-treasurer of the Ontario Fire Insurance Company. Ewing suggested that the Western Canada should buy out the Ontario. After several informal meetings a telegram was sent to Calgary to the Western Canada Fire Company suggesting the purchase of the Ontario. On the 19th, Col. Walker, president of the Western Canada, wired back a non-committal answer, saying that they wanted more information and would await Rice's return to Calgary. On the 19th, and before the receipt of this wire from Walker, Ewing drew up and Rice signed the following document:—

St. John, N.B., September 19th, 1911.

The Stockholders of the Ontario Fire Insurance Company, St. John, N.B.

On behalf of myself and associates, I offer to take over all or any of the shares in your company, provided the amount acquired be not less than

the control or 50% of the entire company, the holders of which shares are willing to surrender these shares to me, and upon which stock at least 50% has been paid up.

On all stock thus surrendered and transferred to me or my nominee, I will guarantee to relieve the present holders of any further liability.

Furthermore, I guarantee on behalf of myself and associates to pay into the Ontario Fire Insurance Company on or before October 30th, 1911, on the stock acquired by me and my associates, the sum of $35,000 in cash, or in securities acceptable to the Dominion Insurance Department.

Yours truly, (Sgd.) J. E. RICE.

Rice also signed the following document:—

I, J. E. Rice, of Calgary, Alta., do hereby give to you, Percy W. Thomson or to you Robert S. Ewing, power to accept transfers of shares in my name in the Ontario Fire Insurance Co.

Dated this 19th day of September, A.D. 1911, in the City of St. John, N.B. [SEAL].

Witness: J. Royden Thomson. (Sgd.) J. E. RICE.

These documents were left with Ewing and Thomson. Rice stated in his evidence that Ewing said that he wanted something to shew the shareholders. Rice also stated that in making the above arrangement he never intended to act for himself personally, but only for the Western Canada Fire Insurance Company as a company, although he admitted that the Western Canada had no power to purchase stock or shares in any other company, but had power only to amalgamate. On a reference to sec. 24 of ch. 24 of the Statutes of Alberta, 1910 (2nd sess.), the Act incorporating the Western Canada Fire Insurance Company, it appears that this is the case, although the procedure to be followed in amalgamation is not very definitely laid down. Rice swore, and there was no evidence to contradict him, that he told Ewing and Thomson that the Western Canada had no power to purchase shares in any other company. He also swore that Ewing and Thomson both knew that he was acting for the Western Canada. He stated that by the words, "my associates," in the letter above quoted, he meant the Western Canada Fire Insurance Company, for whom he was acting. Rice then left for the west, having made no further arrangements of any kind. On September 25 the meeting of shareholders was held, and in the minutes of that meeting it is stated that it was called to consider three plans: first, to sell the company; second, to re-insure the company's liabilities and wind up the company; third, to provide sufficient capital to "rehabilitate" the company. A letter was there read from the Superintendent of Insurance, in which he commented

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upon the position of the company, saying that its capital was all gone, and that additional capital should be paid in. It is also recorded in the minutes that the vice-president advised the shareholders that to re-insure the liabilities of the company and wind it up would require three or four more calls, that his suggestion was not entertained by the meeting, and that no one could consider the proposition of providing more capital. The meeting of the shareholders was not a very large one, apparently, only one shareholder who was not a director being present in person, while Percy W. Thomson held proxies for 850 shares, including a proxy for one Dale for 250 shares. The letter of September 19 from Rice was then read, and a motion was carried that it be submitted to the shareholders individually. The meeting was unanimous, so the minutes state, in favour of the proposition, but it was recognised that the meeting could not commit the stockholders not present. The secretary was directed to send a brief resume of Rice's offer to the shareholders, and to advise them of the opinion of the meeting as to the three plans.

The next important entry in the minutes of that meeting is to the effect that the following transfers of shares were reported and accepted: Ella V. Thomson to J. E. Rice, 250 shares; J. Royden Thomson to J. E. Rice, 50 shares; Percy W. Thomson to J. E. Rice, 407 shares; Robert Thomson to J. E. Rice, 365 shares; National Insurance Corporation to J. E. Rice, 100 shares; Florence A. Tingey to J. E. Rice, 6 shares; Louisa A. Thomson to J. E. Rice, 20 shares. The next entry is to the effect that the secretary (*i.e.*, Percy W. Thomson) reported that Mr. Robert Thomson and Mr. J. Royden Thomson, having sold their stock, ceased to be directors and officials of the company. Here another entry follows referring to the resignation of William Thomson & Company as general managers.

It appears from the share register and from the share certificates that already, on September 20, the next day after Rice's departure and five days before the shareholders' meeting above referred to, and therefore long before there was any certainty that the $35,000 in cash referred to in the letter of the 19th would be forthcoming, the Thomsons proceeded to transfer their shares to Rice. Tingey's were transferred on the 21st. On September 29, Thomas Clarke transferred to Rice 10 shares and Lucy M.

Noyes 50 shares. This made up, in all, 1,258 shares transferred to Rice by that date.

In the shareholders' minute book the following entry appears without date, although obviously the date of its entry must be later than September 30:—

"At the request of the vice-president (this was R. S. Ewing) it was decided to place in the minute book the following telegram:

Calgary, September 30.

Arrived last night, Board Meeting held to-day. Have made call of 20% as arranged, thirty days required from Monday to collect call, should provide $50,000, stock certificates received.

"This telegram is signed by J. E. Rice, Western Canada Fire, and is an evidence that Mr. Rice fully intends to carry out his arrangement in accordance with his letter to the stockholders, etc."

In my opinion this memorandum must have been made with the knowledge of at least the directors who resided in St. John, and it would seem to shew that the Thomsons, at least, as well as Ewing, must have understood what Rice in his evidence stated to be the case, that Rice was acting not on behalf of himself personally, but really on behalf of the Western Canada Fire Insurance Company or its shareholders. That company, of course, had no power to purchase shares in another company; and if it be said that Rice was acting merely on behalf of certain shareholders of that company, whose identity was still unrevealed, it must have appeared very strange to the persons in control in St. John that the $35,000 promised was to be raised by a call upon the stock of the Western Canada Fire Insurance Company. Rice was, I have no doubt, attempting in a very clumsy fashion, and without the advice and direction, apparently, of a legal adviser, to effect in some way an amalgamation of the two companies.

On October 2, Percy W. Thomson sent the following letter to Rice:—

St. John, N.B., October 2nd, A.M., 1911.

Dear Sir:—Many thanks for your telegram that you had held a meeting of the Western Canada and made a call of 20%, payable November 2nd, which *should* provide $50,000, and that the stock certificates have been received. I am reporting therefore to my directors, and no doubt you will arrange that $35,000 is paid in to the Ontario Fire, either in cash or in approved securities, suitable to the Dominion Insurance Department, before October 30th as agreed.

I confirm my night letter of September 30th, in which I suggested that you *supply additional names*, together with wired power of attorney to Mr.

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Ewing, Vice-President, and to myself, so that we could transfer the stock over to different names rather than to one person, and in addition to this that you should authorize Mr. Ewing and myself to subdivide some of your holdings and this action would disarm a possible criticism by the Insurance Department relative to one man holding all the stock.

The night lettergram referred to in this letter is not produced, but it was apparently as a consequence of the suggestion which it is said to have contained that the following telegram was sent to Thomson & Company:—

Thomson & Son, St. John, N.B. Calgary, Alberta, 4, 5-11.

We appoint Percy W. Thomson or Robert Ewing our attorney to accept transfer of Ontario fire stock on which fifty per cent. has been paid.

(Sgd.) JOHN CRAIG.

On October 4 Rice sent the following telegram to St. John:—

Thomson & Son. Calgary, Alta., October 4.

Transfer four hundred shares Ontario Fire to John Craig, two hundred each to William H. Rowe and Stephen G. Wheatley, all of Calgary, will advise later who to elect president and further division of shares.

7.15 A.M. 5th. (Sgd.) JAMES E. RICE.

On October 13, at Calgary, James Walker and Francois Adams signed under seal the following document:—

We, the undersigned, hereby appoint Percy W. Thomson, or failing him, Robert Ewing, our attorney to accept transfer of shares in the Ontario Fire Insurance Company upon which 50% has been paid.

This seems to have been forwarded to St. John by Rice in the letter referred to in the following telegram:—

Percy W. Thomson. Calgary, October 27.

Appoint Colonel Jas. Walker president, and Francois Adams director, and transfer two hundred shares to each, letter in mail. J. E. RICE.

On October 24, 1911, a directors' meeting was held, at which Ewing presided as vice-president and at which Leavitt, Porter and P. W. Thomson were the other directors present. It was decided to borrow $10,000 from the company's bank upon a note. Rice and Craig, a Calgary man, were elected directors; Porter and Leavitt resigned, and their resignations were accepted.

On November 1 Rice sent the following telegram:—

Ontario Fire Insurance Company.

Please transfer two hundred shares each to Col. Walker and Francois Adams, and I hereby appoint Percy W. Thomson my attorney to execute such transfer.

Witness: S. G. Wheatley. (Sgd.) J. E. RICE.

On November 2 there was a directors' meeting, at which only Ewing and Percy W. Thomson were present. It was reported that a $10,000 draft on Rice had been honoured and the note given the bank retired. Col. Walker and Francois Adams

were elected directors by the only two remaining directors who still stayed with the ship. This repetition of the former action was no doubt due to the lack of qualification in these men previously, because apparently until the telegram of November 1, P. W. Thomson had not even a shred of authority to execute transfers of shares on behalf of Rice. Ewing and Thomson at this meeting also elected Walker president of the company.

On November 7, Ewing and Thomson held another directors' meeting, the minute of which says that waiver of notice had been received from Rice, Craig and Heighington, and a telegraphic consent received from Adams and Walker. A motion was passed changing the head office to Calgary. A shareholders' meeting, however, was legally necessary to confirm this.

On November 18, 1911, another directors' meeting was held, at which Ewing, P. W. Thomson and one W. H. Rowe were present. Rowe had been elected a director at a previous meeting of the directors. Waiver of notices were received, so the minute states, from Walker, Craig, Wheatley and Adams, all Calgary men, and from Heighington. The minutes then proceed to say that P. W. Thomson stated that it being *his intention* to sell his stock he resigned as secretary-treasurer. His resignation was accepted, and Rowe elected instead. R. S. Ewing stated that he was leaving the city, and resigned as vice-president and managing director. His resignation was accepted, and J. E. Rice elected instead. Then a motion was passed cancelling R. S. Ewing's 118 shares of stock for non-payment of the call of 10 per cent. made on October 5th.

The scene then shifted to Calgary. Early in December the books seem to have been forwarded there from St. John, and on December 11, 1911, there is an entry of minutes of a directors' meeting, at which Walker (president), McCormick (vice-president), J. E. Rice (managing director), Craig (a director), and Wheatley and Rowe are recorded as being present. There was a motion passed that McCormick, Warnock, Day, Wheatley and Rowe be directors. There is a minute that the following shares be allotted: F. Adams, 200 shares; J. Craig, 262 shares; J. E. Rice, 858 shares; W. H. Rowe, 102 shares; Col. Walker, 200 shares; S. G. Wheatley, 112 shares; total, 1,734 shares.

There is no record that the people applied for these shares, but some indication of what was in the minds of the persons

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present is given by the next entry, which is to the following effect: "In accordance with the request of the holders, it was resolved that the following shares be and are hereby cancelled, and all calls thereon be forfeited to the company." Then follows a list of names, with various amounts in shares set opposite, the total number being just 1,734. In this list appears the names of the transferors of the above-mentioned 1,258 shares, apparently, for the number of shares they already had transferred to Rice and a large number of other names for smaller amounts of stock apparently for the number of shares they had transferred to Rice, Craig and Wheatley.

At the hearing the evidence in regard to schedule A was closed only so far as related to those on that schedule who had been directors of the company, that is, the three Thomsons, Leavitt, Porter and Ewart. Ewing, though a director, does not appear on schedule A, because his shares were cancelled, not assigned. I have stated some of the facts in regard to the transfer of these directors' shares. It appears that on October 2, 1911, Ewart transferred 20 shares to John Craig, and that on October 5 this transfer was accepted by P. W. Thomson as attorney for Craig. This was done, no doubt, under the authority of the telegram of October 4 above quoted. Ewart had paid $800 on these shares, and just before transferring them is credited with having paid $200 more. On September 20 P. W. Thomson signed a transfer of 20 shares, not above-mentioned, to J. E. Rice, but apparently on November 18 he changed the name of the transferee to John Craig, because on the latter date he purports to accept the transfer as attorney for Craig. Robert T. Leavitt, who had subscribed for 20 shares and had paid $800 on them, apparently paid the October 5 call of 10 per cent., *viz.*, $200 on October 24, 1911, and on the same day transferred the shares to Craig. Alfred Porter was in the same position, and did exactly the same thing.

There does not appear to have been any meeting of directors at which the transfers by the directors themselves to Rice and Craig were ever passed upon. The transfers are, in fact, recorded in the share register, but whether the Court can presume, in the absence of any evidence one way or the other, that these entries were made by the authority of the directors and not by the secretary-treasurer on his own motion, may be a question. In so far as the transfers of September 20 and 21 are concerned, there is,

of course, the minute of the shareholders' meeting of September 20, in which it is stated that these transfers were "reported and accepted." Whether such an approval by the shareholders can take the place of a passing upon the transfers by the directors or not may be another question. It seems clear, however, that the approval of the shareholders' meeting could have no effect, for two reasons: first, because at that date the condition upon which Rice's offer had been made, *viz.*, that he was to get over 50 per cent. of the shares, had not been fulfilled, and his offer was still conditional; and second, because the statutes, as I shall point out, places the duty upon the directors, and not upon the shareholders, of approving or rejecting a transfer.

It appears that the company is subject to the provisions of the Companies' Clause Act, being ch. 118 of the R.S.C. (1886), which was the statute in force when the company was incorporated in 1905. It is true that by sec. 3 of that Act insurance companies are expressly excepted from its operation, but the special Act of Incorporation, 4 & 5 Edw. VII., ch. 137, says in sec. 10 that "the Companies' Clause Act, except secs. 18 and 39 thereof, shall apply to the company in so far as it is not inconsistent with any provisions of the Insurance Act." Section 24 of the Companies' Clause Act does not appear to contain any thing inconsistent with the Insurance Act, and it seems clear that by virtue of the provision quoted from the special and the later Act, this section does apply to the company. The section reads in part as follows:—

> The Directors may allow or refuse to allow the entry in any such book (i.e., the stock book provided in the preceding section) of any transfer of stock whereof the whole amount has not been paid; and wherever entry is made in such book of any transfer of stock not fully paid up to a person who is not apparently of sufficient means, the directors shall be jointly and severally liable to the creditors of the Company in the same manner and to the same extent as the transferring shareholder, except for such entry, would have been.

Section 25 provides in effect that no transfer for stock, except made under judicial process or order, is to be valid unless entry thereof is made in the stock book, except to shew the rights of the two parties and to render them both jointly and severally liable to the company and its creditors. Section 26 provides that the stock book shall be open at all reasonable hours for the inspection by shareholders and *creditors*.

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Inasmuch as the transfers in question do appear to be in part recorded in the stock book, and the liquidator has not raised any question in regard to the matter, I think it proper to take it as admitted that the transfers were in fact passed upon at some time or other by the directors and the entries thereof recorded by their authority, even though there does not seem to be any record of any such action at a meeting on their part, and though no mention of any such meeting is made in the affidavits filed by some of the transferors who were directors. The affidavit of P. W. Thomson does state that the transfers were "fully entered in the books of the company." The onus of proving absence of action by the directors was clearly on the liquidator, inasmuch as the present application is an application to add to the list of contributories persons who do not appear on the register.

The contention on behalf of the liquidator rests upon two grounds: first, that Rice and his associates were persons "not apparently of sufficient means," and that therefore the directors who passed upon the transfers made by each of their fellow directors individually and by themselves individually and allowed them to be entered in the stock book are still jointly and severally liable to the same extent as the transferring director would, but for such entry, have been liable, by virtue of the latter part of the extract from sec. 14 above quoted; secondly, that apart from that provision, the transfers of their shares by the individual directors in this instance come within the scope of one at least of the rules laid down in *Lindlai's Case*, [1910] 1 Ch.D. 312. It was indeed upon this case that counsel for the alleged contributories chiefly relied. The Court of Appeal in England, consisting of Cozens-Hardy, M.R., Fletcher, Moulton, and Buckley, JJ., laid down, in a considered judgment prepared by the last-named Judge, three propositions, which may be quoted partly but not entirely from the headnote, as follows:—

"Where the articles contain no clause authorizing directors to reject a transferee, a shareholder may, up to the last moment before liquidation, and for the express purpose of escaping liability, transfer his partly paid shares to a transferee, even though he be a pauper, and may compel the directors to register that transfer, provided it be an out-and-out transfer reserving to the transferor no beneficial right to the shares, direct or indirect." Whether the transfer is of that character is a question of fact.

Where the articles contain a clause empowering the directors to reject a transferee whom they do not approve, the transferor cannot escape liability if he has actively by falsehood, or passively by concealment, induced the directors to pass and register a transfer (even though it be an out-and-out transfer) which if he had not so deceived or concealed they would have refused to register. Here, again, the question is one of fact.

Whether the articles do or do not contain a clause authorizing the directors to refuse registration, the transferor cannot escape liability where he has obtained the advantage of executing and registering the transfer upon an opportunity obtained by him fraudulently or in breach of some duty which he owed to the corporation.

Of course the present case does not come within the first rule laid down, because the directors here had power to refuse to register transfers.

There is an obvious difficulty in attempting to apply either the second or third rule to the present case, because those rules are clearly based upon the assumption that the transferring shareholder is a person distinct from the directors. It is for this reason, as well as because of the special terms of the statute, that it seems to me quite impossible to say that *Lindlai's* case is conclusive against the liquidator. Other considerations inevitably arise out of the dual position of the directors here. It is clear that, in passing upon transfers where they have a right to reject, the directors are exercising a power placed in their hands for the benefit of persons other than themselves, and are virtually trustees. More than this, if the power is placed in their hands merely by articles of association which constitute a contract among the shareholders only, it may be that the power is exercisable only in the interest of the shareholders who have placed it in their hands. But there is something more than that here. The power is placed in the hands of the directors of this insurance company by the special Act incorporating it, and it seems to me that it might very reasonably be contended that owing to the general tenor of the provisions of secs. 24, 25 and 26 of the Companies' Clauses Act, which are made applicable to this company in the way I have shewn, the power to pass upon transfers of stock not fully paid up was intended by Parliament to be exercised, not

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merely in the interests of the general body of the shareholders, but in the interest also of the public doing business with the company and becoming its actual or contingent creditors.

After much consideration now I have come to the conclusion that the old directors ought to be added to the list in respect of the shares transferred by themselves and accepted by them while they were directors.

I come to this conclusion simply upon the wording of the statute. But, before dealing with that, I think it advisable to make some observations which are perhaps more especially applicable to the question of the general liability of the directors in respect of all the shares transferred.

I think it probably true that if there was no fraud upon the other shareholders who signed, no transfers and no breach of duty towards them, the directors cannot be bound to make any more careful inquiry into the standing of a proposed transferee, where they are transferring their own shares, than would be demanded of them when passing upon a transfer of a shareholder who is not a director.

It is clear, from the affidavit of Percy W. Thomson, that the offer of Rice was communicated to all the shareholders, so that an equal opportunity was given to all to accept. Rice was not paying anything for the shares, and it was therefore a matter of indifference to him if every single shareholder took up his offer; at least, if we assume that the amount unpaid on one-half the stock would be sufficient to meet all the then outstanding liabilities, which I think was the case. Of course the shareholders were entitled to be informed not only of Rice's offer but also of the exceedingly difficult and dangerous position in which the company then stood. I am inclined to think that it might not improperly be inferred from the evidence before me, that the shareholders were fairly well advised of the unsatisfactory condition of the company.

But, however this may be, there is the high authority of Lord Cairns, in his judgment delivered in the House of Lords in *Murray* v. *Bush*, L.R. 6 E. & I. App. at p. 59, that a remedy against the directors could in such a case only be obtained by a bill in equity, and not under winding-up proceedings.

It is also somewhat difficult for me to reconcile the views expressed by Lord Cairns with any application to the case of a

director transferring his own shares of the third rule laid down in *Lindlai's* case, which is in any case only *obiter*, and expressed also only in respect of a transfer by a person who is a shareholder only.

For the purpose of the single matter which is before me for decision, *viz.*, whether the old directors can be made liable in respect of their own shares which they transferred, I do not think it necessary to go beyond the terms of the Companies' Clauses Act. Under the terms of that Act, I do indeed find it difficult to see how the directors can be in any worse position with regard to a transfer made by themselves than with regard to a transfer made by any ordinary shareholder. In the one case, as in the other, the test seems to me to be in the question, "Was the transferee not apparently of sufficient means?" It is true that as a general rule a director will be liable to know more about his own purchaser or transferee than about the proposed transferee from an ordinary shareholder. But in either case the same rule must apply according to the facts. In the case of his own transferee more things, in fact, may be *apparent* or will likely be apparent, but in either case the meaning of the statute must surely be that judgment must be passed upon the act of the directors in approving the transfer according to what was or was not *apparent* to *them*. I think that in either case one result of the statute is that the directors must not approve a transfer to a person, for instance, about whom they know absolutely nothing at all, for in such a case the transferee cannot appear to be of sufficient means. The effect of the statute obviously is that in order to be relieved there must be a *positive appearance* of sufficient means. If the word "not" had been differently placed so that the phrase would read "*apparently* not of sufficient means," then I think the effect would have been to make the burden upon the directors lighter, because then there would have to be a positive appearance of insufficiency in order to impose the burden; whereas, as the words are placed, there must be to them a positive appearance of sufficiency in order to relieve them from it. The question, therefore, is whether the liquidator has shewn that there was not such a positive appearance of sufficiency. This reveals a distinction which must be borne in mind between the burden of inquiry or knowledge or judgment, or whatever it may be called, which rested upon the directors at the time of approval of the transferees and the burden of proof which rested upon the liquidator

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at the hearing of the application. I think that in the first instance the burden of proof that the transferees did not present to the directors such a positive appearance of sufficiency as would relieve them from the burden otherwise imposed by the statute rested upon the liquidator. In view of this circumstance, that the burden upon the liquidator was that of proving a negative, I think he went as far as the Court should call upon him to go or as he could be expected to go, and that he should not be expected to exhaust all possible facts which might have appeared to the directors and shew that they did not so appear, but that he, having gone as far as he did, the directors, if they claimed that certain facts did appear to them to be true with respect to the proposed transferee which apparently shewed him to be possessed of sufficient means, should have presented such facts to the Court on their own behalf.

Now, how far did the liquidator go in his proof? It was shewn that Rice happened to be in St. John in connection with some business of the Western Canada Fire Insurance Company, of which he was a managing director; that some of the officers of the Ontario suggested to him the question of acquiring the control or ownership of that company; that Rice informed them that his company had no power to buy shares in another company; that he telegraphed the proposal to Walker, then president of the Western Canada, who replied that more information was needed, which telegram I must infer was brought to attention of the Ontario directors, and that then Rice signed the offer drawn up by Ewing, and the power of attorney to P. W. Thomson to accept on his behalf, that he immediately left for the west, and that then the very next day—with what would appear to have been rather indecent haste—1,258 shares were transferred to him, either by the directors themselves or by shareholders to whom they immediately communicated the offer and with whom they must have been very closely in touch. Rice was not paying anything for these shares to the transferors, so that the directors as transferors had no direct personal interest in his financial standing. He was, however, to their knowledge, assuming a contingent obligation to the company which would become a real one whenever calls were made to the extent of $62,900. Is it not fairly clear from the circumstances that Rice did not really positively appear to the directors to be of sufficient means to meet such a possible

obligation. His offer was received on the 19th. His residence was in Ca'gary, and his business centred there. There is no evidence of any intervening inquiries having been made about him prior to the execution of the transfers. Owing to the distance and the shortness of the time, I think it is in any case impossible that really sufficient inquiries could have been made. But there is more than that. It seems to me that the inference must not be made from the facts proven, and particularly from some of the later telegrams which I have quoted, that the directors knew perfectly well that Rice had not the slightest intention of purchasing all these shares in his own name, but really intended to get other people, *to the directors absolutely unknown*, to become the owners of them. They could not have thought that the resources of the Western Canada as a company were behind him, because they had been informed that that company had no power to acquire shares in another company, and they therefore must have known that for sufficiency of means they must look to individuals only, to Rice and his associates. It is true that by the insertion in the offer which Rice signed of a guarantee to pay $35,000 upon the shares acquired, either in cash or securities satisfactory to the Superintendent of Insurance, the directors seem to have to some extent been conscious of their duty. But the mere fact that Rice signed such a guarantee cannot be said to have added any strength to his appearance of sufficiency, because it did not decrease the extent of his obligation and it furnished no evidence at all of his financial strength. If the directors had waited before approving of the transfers until they saw how far he could fulfil that obligation, and had seen that he was fulfilling it, their case would have been different. Even when the time came to fulfil it only $10,000 in cash was forthcoming, and the security turned over, to which I have not heretofore referred, was obviously very flimsy. How they satisfied the Superintendent of Insurance, if they did satisfy him, I fail to understand.

Even if events which occurred subsequently to the date of the bulk of the transfers in question, *viz.*, September 20, could have any bearing upon the matter, I can find nothing in any of these events which would strengthen the appearance of sufficiency. The telegram of September 30, which purports to be signed by Rice, and which, although he denied it, I think he probably did sign, does indeed indicate that the expected money was to be raised

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by a call upon the shareholders of the Western Canada, but this, in my opinion, carries the matter no further, because there is every reason to believe that the directors knew absolutely nothing about the apparent sufficiency of those shareholders to meet any call upon them. Moreover, they knew, because they had been told, and it was in the law, that there was no right to use the funds of the Western Canada as a company to pay for and purchase stock in the Ontario. Certainly they knew that there was nothing in the memorandum of September 19 which in any way bound the Western Canada as a company to stand behind Rice on his proposed purchase of their shares, and they had every reason to know that no proceedings could have been taken to secure the approval of the Western Canada shareholders by September 30, when the telegram was sent, because Rice was managing director and could not get back to Calgary before the 24th or 25th.

I think, therefore, that I am justified in finding that the liquidator has shewn that the directors approved of transfers to transferees who were not apparently of sufficient means, and that with respect to such transfers the effect of the statute is to place upon the directors both jointly and severally the same liability as the transferring shareholders would have been under except for the entry of their transfers.

There are, however, some minor questions to be dealt with. Upon the list as presented to me the directors are not entered as being liable for any but their own shares previously held. They are not entered as being liable jointly and severally either for each other's shares or for the shares of shareholders who are not directors. I do not understand, therefore, that upon the motion as made before me I have any power to order that they be made contributories to any greater extent than to the amount unpaid on their own shares previously held. Not being on the share register, the burden of proof in seeking to add them was upon the liquidator, as I have stated, and when I speak of their names as being upon schedule A all that is meant is that that is a schedule of names not taken from the register as it now stands, but prepared from the stock certificate book with a view to the motion to place them upon the list.

This, I think, still leaves it open to the liquidator to move, if so advised, to add each of the old directors in question to the list, also with respect to the shares formerly held by each of the

other directors and by each of the shareholders whose transfers were approved by them. And after any such motions were made and allowed, if that should be the result, the position of the transferring shareholders, who were not directors, would still be left open according to the arrangement at the hearing. In view of the effect which I give to the words of the statute, it becomes unnecessary to distinguish between the position of the directors *qua* transferors merely and *qua* directors. With regard to the case of Ewing, a director whose shares were never transferred at all, but cancelled, and whose name is upon another schedule including a different class of alleged contributories, it would seem to be still open to the liquidators to apply to make him liable, not merely for his cancelled shares, but also, under the statute, for the shares of each shareholder, whether co-directors or not, whose transfers he approved in violation of the statute.

The directors who transferred their own shares on September 20 were J. Royden Thomson, Robert Thomson, and F. W. Thomson. Leavitt and Porter did not transfer theirs until October 24. They, on that date, each transferred twenty shares to Craig, and also resigned their position as directors. I think it is quite clear from the evidence that they knew nothing of Craig, that his name was merely sent down by Rice as a proposed transferee, and that he was not to them apparently of sufficient means to meet an obligation amounting to $2,000. There was, in fact, no appearance at all of any kind with respect to him. The same must also be said of the transfer by G. S. Ewart to Craig of 20 shares on October 2. Ewart was then a director, and obviously knew nothing about Craig. If a motion is made to make the old directors reciprocally liable, some question will arise as to these three transfers which were subsequent to September 25, when two of the Thomsons retired from the directorate, but I do not need to discuss that matter now.

The present order will be that each of the directors, Robert Thomson, J. Royden Thomson, Percy W. Thomson, George S. Ewart, R. T. Leavitt (or his estate), and A. Porter, will be added to the list of contributories with respect to the shares and for the amounts mentioned in schedule A. If the transferees are also added to the list a question may perhaps arise as to whether the old directors are primarily or only secondarily liable, but that matter was not raised on the argument.

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One word I may add, which is this, that I am unable to see what effect the subsequent supposed cancellation of shares made by the new directors in Calgary can have upon the question I have not decided, because at the date of that action there were no shares standing in the names of the old directors which could be cancelled. The shares had undoubtedly been transferred to other persons, and the liability of the directors, which I had held exists, rests, not upon their being now shareholders, but upon the words of the statute as applied to their action in approving of the transfers. I think the directors added must also bear a share of the costs of the application, proportionate to the amount of liability imposed upon them. *Order accordingly.*

[An appeal is to be taken to the higher Court.]

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## LESLIE v. STEVENSON.

*Ontario Supreme Court, Boyd, C. May 8, 1915.*

1. CONTRACTS (§ I C 2—37)—CONSIDERATION—FORBEARANCE TO SET ASIDE SALE.

A forbearance from proceeding to set aside a judicial sale of land is sufficient consideration to sustain a promise by the highest bidder to pay the difference between what the land will bring at a future sale and what he paid for it.

2. CONTRACTS (§ I E 4—80)—STATUTE OF FRAUDS—INTEREST IN LAND—AGREEMENT FOR FUTURE PROFITS.

A parol agreement to pay to the lienholders the difference between what the land will bring at a future sale and what was paid for it in consideration of proceedings being dropped by the lienholders does not relate to an interest in land and is not within the Statute of Frauds.

[*Stuart* v. *Mott*, 23 Can. S.C.R. 153, 384, followed.]

3. CONTRACTS (§ I E 3—75)—STATUTE OF FRAUDS—PERFORMANCE WITHIN A YEAR—AGREEMENT FOR FUTURE PROFITS.

Although a sale of land may not be made for many years still a parol agreement for the payment by the promisor of the profits realized thereon upon such event happening and based on a forbearance by the promisee from legal proceedings is not within the Statute of Frauds.

[*Mills* v. *New Zealand Alford Estate* (1886), 34 W.R. 669, 32 Ch. D. 266, followed.]

Statement

ACTION to recover the difference between the price at which the defendant bought land and the price at which he sold it.

*R. S. Robertson* and *J. J. Coughlin*, for the plaintiff.

*Sir George Gibbons*, K.C., and *G. G. McPherson*, K.C., for the defendant.

Boyd, C.

BOYD, C.:—I reserved judgment after the trial and argument at Stratford to consider the effect of the Statute of Frauds, which was pleaded at the last moment. It was confidently

asserted on the one hand and denied on the other that the statute was applicable, but no cases were cited.

The result of the evidence, though contradictory, was, to my mind, abundantly clear in affirmance of the position taken by the plaintiff.

Briefly, these were the facts. Land covered by mechanics' liens was sold under the direction of the Court to satisfy these liens. After an abortive sale, it was again offered for sale by tender. The plaintiff, who had the conduct of the sale, put in a tender in the name of one of the subsequent lien-holders, and the defendant put in a higher, and in fact the highest, tender, at $2,100, and was declared to be the purchaser. This defendant had been in confidential communication with the lien-holders, and so obtained information which he used, as alleged, to their detriment, in his tender. Next day, the present plaintiff (the chief lien-holder) instructed his lawyer to take proceedings to set aside the sale upon the highest tender; and, this being communicated to the defendant, he said: "If you drop the proceedings, when I sell the land whatever difference is between what I get for it and what I pay I'll hand over to the lien-holders." The promise, in other words, was just this: "Let the sale be carried out by the Court, and when I sell the property and recoup my own expenditure, I'll give the balance of the proceeds of the sale to the lien-holders." It is argued that this was an unthinkable proposition, but the defendant's situation may have been such with the bank of which he was manager that he did not wish to have his action in making the tender canvassed by public investigation at that time. However this may be, I am persuaded by the evidence of three witnesses that this was his undertaking and promise, on faith of which the attack upon his conduct was abandoned.

The sale was on the 16th September, and the vesting order obtained on the 11th October, 1909; he held and rented the land till it was, in January, 1915, sold for $3,000.

The inducement for the defendant's promise was the immediate forbearance, at a critical moment, of the prosecution of the claim to set aside the highest tender, and, whether the attack was likely to succeed or not, was sufficient consideration; and,

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in that view, the Statute of Frauds has no application, though the sale of the land out of which payment was promised might not happen for many years: *Miles* v. *New Zealand Alford Estate Co.* (1886), 34 W.R. 669, 32 Ch.D. 266.

Again, the arrangement as to acquisition of the land being executed and completed, it was open for the plaintiff to sue on the promise to pay, which relates only to money: *Green* v. *Saddington* (1857), 7 E. & B. 503. The doctrine of this case may be questionable, but I would not rest the decision on this ground.

Consider it in the light of another line of cases which lead to the conclusion that the Statute of Frauds, so far as it relates to an interest in land, has no bearing on a promise of this kind. It is clearly laid down in American law that a parol promise to pay to another a portion of the profits made by the promisor in a purchase and sale of real estate is not within the Statute of Frauds, and, if founded upon sufficient consideration, will support an action: *Trowbridge* v. *Wetherbee* (1865), 93 Mass. (11 Allen) 361.

This precise point does not appear to be definitely decided in England, though there are English decisions or dicta pointing that way. The American view was accepted by Chief Justice Strong in *Stuart* v. *Mott*, 23 S.C.R. 384, 388, though it does not appear to represent the actual judgment of the Supreme Court.

*Stuart* v. *Mott* (1894), 23 S.C.R. 153 and 384, was an appeal from Nova Scotia, where the plaintiff at first sought specific performance of an agreement, not in writing, by the defendant, to the effect that, for valuable consideration rendered, he would give the plaintiff a one-eighth interest in a gold mine. This failed by reason of the bar of the Statute of Frauds, as being a contract relating to an interest in land. In the trial, however, the defendant admitted that he had agreed to give the plaintiff one-eighth of his interest in the proceeds of the mine when sold, and upon this aspect of the agreement the plaintiff brought another suit for the money to a successful conclusion. It was again raised and argued that the Statute of Frauds was a defence, but Chief Justice Strong held that the

contract for a share of the proceeds was not one for an interest in land, within the statute.

In his analysis of the contract sued on, the Chief Justice said that "it was one exclusively relating to an interest in money; it was true the money was to arise from the sale of land (i.e., a mining interest), but that, on authority, can, I conceive, make no difference after the land has been actually sold. It is not sought to enforce any trust or contract to sell the land . . .; the sale has taken place, and the only question is as to a share of the price received" (p. 388).

The learned Chief Justice cites only American cases, with a reference in a foot-note to one English case, *Smith* v. *Watson* (1824), 2 B. & C. 401, the point of which is that a person entitled to share in profits has no interest in the property out of which the profits may arise.

I would refer to the language of Buller, J., in an old case of *Poulter* v. *Killingbeck*. A. agreed with B. to let him have land rent-free on condition that A. should have a moiety of the crops. While crops were in the ground, the value was by consent appraised, and, the defendant having refused to pay half the value, an action was brought for the amount. On the Statute of Frauds being pleaded, Buller, J., said that the agreement did not relate to any interest in the land, which remained altogether unaltered by the arrangement concerning the crops: *Poulter* v. *Killingbeck* (1799), 1 B. & P. 397.

That decision is explained by Lord Ellenborough in *Crosby* v. *Wadsworth* (1805), 6 East 602, 612: the bargain was originally an agreement to render in lieu of rent part of a severed crop, in that shape merely a chattel, and by subsequent agreement it was changed into money, instead of remaining as a specific render of produce.

That is the test which may be applied to this case: the agreement is that, in consideration of the abandonment of the proceedings to set aside the tender, the defendant was, upon and after sale of the land, to recoup himself his outlay and pay over the residue of the proceeds of sale to the plaintiff. No land or interest in land was involved, but merely the money which would result from a sale of the land. There was no trust im-

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pressed upon the land, and the purchaser was not bound to sell at all, but, when he did sell it, his promise was, for good consideration, to pay the profits to the plaintiff. The money, doubtless, was derived from the sale of land, but the bargain was about the money alone, and may well stand outside of the Statute of Frauds.

The plaintiff's right of action arose upon and after the sale at $3,000. From the evidence it appears that the defendant expected to sell at an advance almost contemporaneously, but the lapse of time does not affect the real situation.

The apparent profit was $900, and for this the plaintiff was and is willing to accept judgment.

If the defendant is dissatisfied with this figure and thinks it can be reduced, he is at liberty to do so by a reference to the Master. If the parties cannot agree after disclosure of what the defendant has received for rents and profits and what he has expended, with interest properly allowable—if after such discovery the parties cannot settle the amount—it will be referred to the Master to fix the sum payable under this judgment, and he will also deal with and dispose of the costs of the reference.

Meanwhile judgment is for the plaintiff with costs of action. The $900, or whatever sum is found by the Master, is to be applied first in the payment of what is owing to the lien-holders (three in number), in order of priority, upon the principal money, and thereafter any surplus to be applied in payment of interest upon the amount of such liens according to priority.

*Judgment for plaintiff.*

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## GREAT WEST SUPPLY CO. v. THE GRAND TRUNK PACIFIC R. CO.

*Alberta Supreme Court, Harvey, C.J., and Scott and Stuart, JJ.*
*May* 15, 1915.

1. CARRIERS (§ IIIC—392)—LIABILITY AS WAREHOUSEMAN—GOODS IN CAR ON SIDING—DEGREE OF CARE.

A railway company is in the position of a warehouseman in respect of a car-load lot in bond held on a siding after arrival at destination where the holding of the car is subject to demurrage charges until the consignee shall remove the contents; the onus is upon the railway to shew affirmatively that it had exercised reasonable care in an action for non-delivery of the goods which were lost from the car while under demurrage and had probably been stolen.

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2. LIMITATION OF ACTIONS (§ II F—60)—RAILWAY CLAIMS — NEGLIGENT WAREHOUSING—DAMAGE FROM "CONSTRUCTION AND OPERATION."

An action for breach of a railway company's contract of warehousing entered into by it after the arrival of the consignment at destination is not within the limitation of sec. 306 of the Railway Act, Can., which deals with actions for damages caused by reason of the "construction or operation" of the railway.

[*Walters* v. *C.P.R.*, 1 Terr. L.R. 88, doubted.]

Statement

APPEAL from a judgment of Walsh, J.

*Gariepy, Giroux & Co.*, for plaintiff.

*Short, Cross & Co.*, for defendant.

Harvey, C.J.

HARVEY, C.J.:—I agree with the conclusion of my brother Stuart that this appeal should be dismissed with costs, but I base it on the reasons in respect to negligence without expressing any opinion on the first branch of his reasoning.

The trial Judge found that what was urged as negligence was not negligence, but even if this is right I am of opinion that the evidence is such that there is room for suspicion that if all the facts were known negligence would appear, in other words the defendants have not satisfied the onus of shewing that there was no negligence. Indeed, I feel it difficult to conclude from the facts actually disclosed that they used the reasonable care that they owed the plaintiffs. I also agree that section 306 has no application to this case.

Stuart, J.

STUART, J.:—This is an appeal by the defendant from a judgment of Mr. Justice Walsh whereby he gave judgment against it for the sum of $985 for the loss of a carload of cement.

The plaintiffs in their amended statement of claim alleged in effect that for the purposes of the matters in question they stood in the place and were entitled to all the rights of a company called the Western Home Builders Co., Ltd. This was admitted. It was also alleged that the defendants were common carriers. It was further alleged that the Atlas Portland Cement Co. of New York had shipped to the Western Home Builders Co., Ltd., in bond a certain carload of cement and that this car reached the north yards of the defendant company in Edmonton on August 5, 1912, that the defendant informed the plaintiffs, as successors to the assignees, of the arrival of the car, that the plaintiffs, not desiring to handle the cement in Edmonton, but to re-ship it to outside purchasers permitted the car to remain in bond in the defendant's yard until September 27, 1912, that

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then, believing (mistakenly) that the cement was still in the car, they re-shipped it to Imrie and paid $63 freight for that shipment, that they had never prior to September 27 authorized the removal of the car from the defendant company's yards and indeed were not in a position to do so not having yet paid the customs' duty on its contents; that the defendant company charged the plaintiffs $43 in respect of demurrage for the delay in moving the car between August 5 and September 27, which the plaintiffs paid; that the contents of the car were never delivered to the consignee at Imrie, but were lost through the negligence, carelessness or fault of the defendant company subsequent to the arrival of the car and contents at the defendant company's yards in Edmonton while in its custody in bond or alternatively subsequent to the reconsigning to Imrie; and that the plaintiffs made repeated requests to the defendant company to ascertain the whereabouts of the said goods which the defendant failed to do. In response to a demand for particulars the plaintiffs stated that the carelessness, negligence and fault alleged referred to the railway company's action in allowing the car to leave the bonded spur as they did, in delivering the goods in question to parties other than the consignees or allowing the goods to be lost in some way unknown to the plaintiff.

After pleading other defences the defendant pleaded that if it did permit the car to remain in its yard until September 27, 1912, as alleged in the statement of claim that it gave written notice of the arrival of the said car to the plaintiffs on or about August 5, 1912, and that under the terms of the contract under which the said goods were carried it is provided that in the case of bonded goods within 72 hours exclusive of legal holidays after written notice has been sent or given that goods not removed by the party entitled to receive them may be kept in the car station or place of delivery or warehouse of the carrier subject to a reasonable charge for storage and to the carrier's responsibility as warehouseman and that the defendant discharged their duties as warehouseman with respect to the said goods.

The defendant also pleaded sec. 306 of the Railway Act.

I have referred at length to the allegations in the pleadings for the reason that upon the argument of the appeal it was contended that the judgment delivered against the defendant company was based upon a ground not raised by the pleadings at all.

It appeared in evidence that the plaintiff company had a warehouse adjoining, not the tracks of the defendant company,

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but a track or spur known as the Bellamy Spur of the Canadian Northern Railway some distance, I think, at least two or three miles, from what was called the bonded track of the defendant where by arrangement with the customs authorities cars shipped in bond over the defendant's railway were to remain until cleared through the customs office. The learned trial Judge found that the car before being cleared through the customs was transferred without the knowledge of the plaintiffs from the tracks of the defendant to the Bellamy Spur by a connecting transfer track at least as early as August 9, that it remained there until August 22, when it was returned as an empty by the switchman to the tracks of the defendant and that its contents had been stolen from it on August 21, while it still remained on the Bellamy Spur. No clearance was made through the customs until September 27, over a month afterwards, and on that date the car was rebilled to Imrie, both acts being done on the assumption that the cement was still in it and, as the trial Judge found, also on the assumption on the part of the plaintiffs that it had never left the bonded spur of the defendant. Although the car was thus rebilled at that late date by the defendant to Imrie it had in fact been sent east as an empty on September 5 some three weeks before.

The learned trial Judge treated the case quite properly, of course, as one to be decided upon the responsibility of the defendant company as warehouseman. Their duties as carriers had apparently ceased. He pointed out the rule that a warehouseman, as distinguished from a carrier, is liable only if he cannot satisfy the onus cast upon him of disproving negligence. He assumed, quite apparently, that the defendant company had disclosed all the facts it was able to disclose in regard to the matter and decided that upon the facts negligence could not be imputed to them. Particularly he said that in his opinion the removal of the car to the Bellamy Spur did not constitute negligence. But he went on to say:—

> There is, however, another ground upon which I think the defendant is liable. There was no express contract of bailment and, therefore, no express agreement that the goods should be warehoused in any particular place, that is that the bonded car should be kept at any specified spot. But upon the evidence before me I am satisfied that it was the duty of

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the defendant to keep the car on the bonded spur at least until it had been cleared through the customs and the performance of this duty formed, I think, a part of the contractual obligation which the defendant was under to the plaintiff. Both parties acted upon this understanding, for, as I have said, the matter was dealt with by them on the re-billing to Imrie on the assumption that the car ever since its arrival in Edmonton had been and then was on the bonded spur.

The learned Judge then referred to *Lilly* v. *Doubleday*, 7 Q.B.D. 510, a case in which the defendant contracted to warehouse certain goods for the plaintiff at a particular place, but he warehoused them at another place where without negligence on his part they were destroyed. The defendant was there held liable on the ground that he had broken his contract, had stored the goods at a place other than that at which he agreed to store them and that he must be responsible for what there occurred to them. Following this case and holding that its principle applied the learned Judge gave judgment for the plaintiffs.

It is with regard to the course taken by the trial Judge in resting liability upon a breach of contract and not upon negligence that the appellant company complains that the decision was given upon a ground not raised by the pleadings.

I am not sure that the learned trial Judge put the case quite strongly enough for the plaintiff when he said that there was no express contract of bailment. The evidence is that immediately upon the arrival of the car in Edmonton on August 5 the defendant's officers sent a notice to the plaintiff in these words, "The Grand Trunk Pacific Railway requests your order as to the disposal of the undermentioned freight." (Here follows a description of it) and in the margin there was printed the following:—

> This freight remains here at owner's risk and is subject to storage for shed goods at company's rate for such storage. The tolls prescribed by the Canadian car service rules shall be payable upon any car held beyond the free time allowed and together with the freight charges shall be a lien upon the contents of the car. The property will be delivered only on presentation of this bill.

The evidence shewed that the defendant did collect $43 from the plaintiffs as demurrage on the car under the terms of this notification. The defendant company did, in my opinion, by sending this notification and by retaining the goods in the absence of any answer from the plaintiffs, contract to retain the

goods as warehousemen and that they considered there was a contract is shewn by their acceptance of pay for having done so. Perhaps, however, all that the learned Judge meant was that this notification was not, in terms, a contract. No doubt, as he says, there was no express agreement that the goods should be warehoused in any particular place or that the bonded car should be kept in any particular spot. But it does appear to me to be clear that, by the terms of what was undoubtedly a contract of warehousing either express or implied, the defendant undertook to retain the goods in its own possession and control. I cannot see how any other interpretation can be put upon the words of the notice above quoted. It may be that the defendant did not bind itself down to so narrow a location as the bonded spur in the contractual obligation which it assumed. That it had in fact so bound itself was the view taken by the learned Judge. Whether that be so or not it seems clear to me that it became part of the defendant's contractual obligation to retain the goods in its own possession and under its own control.

In placing the car containing the goods out of its own possession and control and into the possession and control of another railway company, viz., the Canadian Northern, as it undoubtedly did, because there was no evidence that it looked after the car in any way but clear evidence that it was the Canadian Northern that had control of the car and inspected it by checking from time to time, it seems perfectly clear that the defendant company was guilty of a breach of its contract. No notice of the change of possession was given to the plaintiffs and there is nothing to shew any assent on their part to any change, even though the car was placed very near their warehouse which adjoined the Canadian Northern track. It is not shewn that any official or employee of the defendant company had any right to look after the car while on the C.N.R. tracks nor that any such official or employee did in fact have any charge over it there.

In these circumstances I think the defendant company is liable for the loss even aside from proof of actual negligence. The case relied upon by the learned trial Judge seems to me to cover the present one and seems also to be based upon a sound principle. If a man undertakes for a consideration to take care

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of the goods of another as a warehouseman and without authority places them in charge of another warehouseman it is difficult to see, as pointed out in *Lilly* v. *Doubleday*, what answer he can have when the goods are demanded of him. How can it be an answer to say that he handed them over to another in breach of his contract and that from that other they were stolen. The owner may very well have been ready to trust the goods to the possession of his chosen warehouseman, but not ready to trust them to another not chosen by him.

The only difficulty which is suggested is that it possibly cannot be said that the breach of the contract was the cause of the damage or loss. But why should the burden of proving that be cast upon the owner when he has not the burden of proving negligence when the goods are lost while in the possession of his warehouseman. If the warehouseman is bound to prove absence of negligence where he keeps them all the time in his own possession surely he ought to bear the burden of proving that his breach of contract did not cause the loss when he has broken it by placing the goods in the possession of another. It seems to me there is a stronger reason for casting this burden upon him because he has by his own wilful act deliberately broken his contract. Rowe, an employee of the defendant, emphatically denied the possibility of the car having been transferred to the C.N.R. by mistake. As is said in *Davis* v. *Garrett*, 6 Bing. 716, "it might admit of a different construction if he could show not only that the same loss *might* have happened, but that it *must* have happened if the act complained of had not been done; but there is no evidence to that extent in the present case." As pointed out in *Lilly* v. *Doubleday* the decision in *Davis* v. *Garrett* did not rest upon the law of carriers at all. The present case is obviously a much stronger one against the defendant company than was *Davis* v. *Garrett* against the defendant there. But as I have observed the defendant complains that judgment was given against it on a ground not raised by the pleadings. I cannot see anything in this objection. It is quite clear from the pleadings that the defendant company was charged as a warehouseman, even though it was also charged as a carrier of the goods from Edmonton to Imrie. The plaintiffs did, indeed, allege negli-

gence, but that allegation was not necessary in respect of the charge against the defendant as warehouseman. The question of negligence was certainly a relevant one on the assumption that the goods never left the defendant's possession until lost and I cannot see how the defendant was prejudiced merely by the plaintiff alleging something which in any case the defendant was bound, in order to be relieved, to deny. The plaintiffs cannot be supposed to have known, and indeed are found not to have known, of the change of possession. Now can it be competent to the defendant, when charged as it plainly was as warehouseman, and when bound to disprove negligence, to come into Court and reveal a wrongful act of its own consisting in the change of possession which was a breach of its contract and then say:—

> We have disproved negligence and we have shewn that we broke our contract, a thing you, the plaintiff, did not know before at all, and so, though you did charge us as warehouseman we have given the ordinary answer, viz., absence of negligence to your claim and are not bound in this action to give any answer to our own breach of contract which we have, ourselves, just now, revealed.

More than this, it seems to me that in order to disprove negligence the defendant was bound to disclose every possible circumstance within its knowledge in order to enable the Court to determine that it was not negligence. Surely it cannot now be heard to complain that it might have given other evidence bearing upon the case if only the pleadings had been otherwise drawn. I think having accepted as correct the finding that it was not guilty of negligence it must be held to have told all it knew about the matter in any case.

Finally, I have the very gravest doubt as to the propriety of the learned trial Judge's finding upon the point of negligence. He first laid down quite correctly the rule as to the onus of proof of absence of negligence being upon the defendant and then said:—

> The only negligence urged against it in argument was the placing of the car on that spur instead of keeping it on the bonded spur in its own yards.

And after discussing this point he concludes:—

> I, therefore, cannot find negligence against the defendant.

With much respect it seems to me that in order to relieve the defendant the finding should have been

> The defendant has shewn positively that they exercised reasonable care,

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Possibly that was what the learned Judge meant, but the distinction is not a mere verbal one and is essential. In my opinion taking the evidence submitted it ought not to be said that the defendant satisfied the onus cast upon it of shewing that it exercised reasonable care. They failed to shew anything at all about the manner of the transfer to the C.N.R. track. Some evidence of their general system was indeed given, but whether it was followed in this particular case or not is not shewn at all. On August 5 they sent the notification that they held the car awaiting orders and yet in the conductor's train report there is an entry "August 4th, delivered C.N.R., Edmonton." Between that date and August 22 there is no record of the car kept by the defendant company at all. For that interval it depends on the C.N.R. official entirely. (Surely an indication of absolute surrender of possession and control.) No notification was given to the plaintiffs that the car was near their warehouse on the C.N.R. track. Then the customs official Turner said:—

> I can't recollect that one particular car at all as far as the seal-breaking goes, if it was with the rest of them there I might have broken the seals there (*i.e.*, on the bonded spur), for this reason we were sending a number of cars out west for the Grand Trunk and they were nearly all cement . . . it was impossible to send an officer to Tete Jeune Cache or wherever they were sent so we used to make a point of breaking them here.

This indicates a possibility that the customs seal may have been broken while it was still in the north yards. Of course, the defendant company may say that if the customs official had a mind to break the seal that was none of its concern. But if it did happen to be done what is to be thought of the defendant's action in sending the car of cement with the custom seal broken down to the C.N.R. track without notifying the plaintiffs? Of course this is not proven, but the plaintiffs do not have to prove negligence. The defendant has to satisfy the Court that they used reasonable care. Another circumstance is the fact of the car having actually been sent East as an empty on September 5 and yet the defendant rebilled it on September 27, really thinking apparently that it was still in Edmonton. Does not this suggest to a certain looseness in the manner of dealing with cars. Of course, the Court would not attach such importance to this, perhaps, if it were necessary to find negligence affirma-

tively. But all these circumstances are of some importance when the Court is asked by the defendant to say:—

> You have shewn that you exercised reasonable care of the goods entrusted to you for the keeping of which you were charging $1 a day.

In addition to this there is plainly no record of either railway company as to the car's whereabouts between August 4 and August 9. There are 4 or 5 days during which no one can say where the car was. In the records kept by the C.N.R. the date of the arrival of the car on their tracks is changed from time to time. It is stated to be the 7th, the 10th, the 13th, and then the 10th again. Nor am I satisfied at all that with such records absolute reliance should be placed on the entry "cement" as shewing that the cement was actually there. Tidsbury, the C.N.R. checker, did not say he ever saw the cement. He relied, he said, on the company's seal and on the car marked "cement." But I notice that one entry of the contents, namely, that on the 9th, is not "cement," but "lead." Tidsbury says:—

> To my certain knowledge the car was never unloaded as far as my check goes.

And he was asked as follows:—

> Q. And you have cement marked opposite this entry on every occasion? A. Yes (which, as I shew, was untrue). Q. Indicating at the time of your checking the car was still loaded? A. Yes, to my knowledge.

This last answer means, of course, only "as far as I know." He did not mean "to my positive personal knowledge."

In view of all this uncertainty I hardly think it is by any means clear that the cement was stolen on August 21. I think it may very well have disappeared even before the 9th during the period when no one knows where the car was. I, therefore, think that the defendant did not sufficiently satisfy the onus of shewing affirmatively that it had exercised reasonable care.

With respect to the plea that the action is barred by virtue of section 306 of the Railway Act it seems sufficient to point out that it is only in respect of damages caused

> by reason of the construction or operation of the railway,

that the action is barred. The damages suffered here do not come, in my opinion, within the meaning of those words at all. The defendant is sued as a warehouseman and not as the operator or constructor of a railway. *Walters* v. *C.P.R.*, 1 Terr. L.R. 88, is doubted in MacMurchy & Denison, p. 513, and was decided

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when the words of the statute were somewhat different. Even if the change in wording has not altered the meaning I should hesitate to follow *Walters* v. *C.P.R.* This damage was caused by a breach of contract on either view of the ground of liability and it seems to me to be an absolutely unwarranted extension of the meaning of the phrase "damage caused by reason of the operation of the railway" to hold that it applies not only to damages caused by the *improper* or *negligent* operation of the railway in the way of tort, as to which I have, in another case in which judgment did not need to be delivered, formed a fairly definite opinion that it does not, but also to a breach of a contract of warehousing, entered into by the company after the arrival of the goods. It was not here the operation of the railway that caused the damage at all, it was the defendant's breach of their contract that caused it.

For all these reasons and on both grounds I think the appeal should be dismissed with costs.

Scott, J.

SCOTT, J.—I concur. *Appeal dismissed.*

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## PARSONS v. TOWNSHIP OF EASTNOR.

*Ontario Supreme Court, Appellate Division, Riddell, Latchford, Middleton, and Kelly, JJ. May 14, 1915.*

1. ARBITRATION (§ III—16)—AWARD—VALIDITY — ARBITRATOR'S REASONS —ERRORS IN LAW.

It is the duty of the Court to set aside an award where an error in law appears on the face thereof; and, where an arbitrator gives his reasons in a memorandum accompanying the award, error in law may be shewn by reference to those reasons.

[*Kent* v. *Elstob* (1802), 3 East 18, followed.]

2. ARBITRATION (§ III—16)—NON-REPAIR OF DRAINS—MALCONSTRUCTION—DAMAGES—NOTICE—VALIDITY OF AWARD.

A notice of claim for damages to lands commenced under the Municipal Drainage Act, R.S.O. 1914, ch. 198, against a municipality for its negligent upkeep and non-repair of drains, and also for the original malconstruction thereof, entitles the owner under sec. 90 of the Act to recover all damages accruing to him before the service of the notice, and an arbitrator's award which merely allows the damages sustained after the service of the notice is erroneous on its face and will be set aside.

Statement

APPEAL from an order of HODGINS, J.A., dismissing motion to set aside award.

*G. H. Kilmer*, K.C., for appellant.

*W. H. Wright*, for defendants.

Riddell, J.

RIDDELL, J.:—This is an appeal by Parsons from the judgment of Mr. Justice Hodgins of the 28th April, in which he re-

fused to set aside an award made by His Honour Judge Barrett (now deceased).

The facts in the case before the arbitration was had, appear from the submission dated the 30th September, 1913. The recitals are as follows:—

"Whereas the Municipal Council of the said Township of Eastnor, under the provisions of the Municipal Drainage Act, on the 11th day of October, 1902, passed a by-law to provide for certain drainage work therein described and known as Fern Creek Drainage Scheme, and also constructed an addition thereto or variation thereof known as the Angle Ditch.

"And whereas the said municipal council, on the 21st day of March, 1906, passed another by-law to authorise the said corporation to issue certain debentures to defray the cost of and to repay loans and advances in respect of said Fern Creek Drainage Scheme.

"And whereas the party of the first part claims to be the owner of lands affected by the said drainage scheme, against which lands a special rate for the construction of the said work is rated and charged.

"And whereas the said party of the first part has commenced proceedings under the provisions of the Municipal Drainage Act, and has served notice of claim on the parties of the second part, claiming:—

"(a) That the said drainage works have never been completed in accordance with the reports of the engineers, on which the said by-laws for the construction of the said works were passed;

"(b) That the said drains, after construction, were allowed to get into a very bad state of repair, and remained out of repair for a long time and are still out of repair;

"(c) That the parties of the second part have constructed other ditches emptying into said Fern Creek drain, and have deepened and widened said drain above the lands of the party of the first part, and have brought water on to the lands of the party of the first part, which the said drain cannot carry away;

"(d) That the parties of the second part have never provided a proper and sufficient outlet for the water brought to the lands of the party of the first part;

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"(e) That the said Angle Ditch has not been excavated to the proper depth, nor to the depth required by the reports of the said engineers under which said ditch was constructed, and the said banks were not sufficiently high and strong to confine the water brought to the lands of the party of the first part by said drain within said banks; and

"(f) That the parties of the second part have suffered and allowed said original ditch below the place where it is tapped by said Angle Ditch to become filled and obstructed, and the parties of the second part have also suffered the said ditch below the lands of the party of the first part to become obstructed by timber, rubbish, and woods, thereby checking the flow of water in same and causing water to accumulate on the lands of the party of the first part.

"And whereas it has been agreed by and between the parties hereto and it is hereby agreed that further proceedings in the Ontario Drainage Court and before the Ontario Drainage Referee shall be stayed, and that the claim of the said party of the first part and all matters in dispute between the said party of the first part and the parties of the second part shall be referred to the determination and award of William Barrett, of the town of Walkerton, Esquire, so as the said arbitrator shall make and publish his award in writing signed," etc., etc., etc.

(It will be seen that the submission is contained in the last recital above set out.)

Under this submission the learned County Court Judge proceeded with the arbitration; and on the 6th January, 1915, made his award: "That the said Parsons is entitled to such damages only which he sustained after having served the said notice on or about the 28th day of June, 1913, and that after that date he sustained no damages whatever."

No costs were awarded *inter partes*, and each party was ordered to pay half the stenographer's fees, etc., etc.

A motion by Parsons to set aside the award was refused by my brother Hodgins; and Parsons now appeals.

Much argument took place before us on the question whether "reasons" for the award, delivered in the same envelope with the award, can be considered so much a part of the award as to entitle the Court to look at them. In my view, it is not neces-

sary here to decide this point—but I am not to be taken as holding or considering that *Kent* v. *Elstob*, 3 East 18, is not good law.

Here the error in law, if any, is apparent on the face of the award—it is held as a matter of law that Parsons is not entitled to damages sustained before the service of his notice. If we are at liberty to look at the reasons, we find the arbitrator saying, "He founds his damages *principally* in the year 1912," but that was an extraordinary season, the land dried off, and he put in his crop, but excessive rain fell thereafter. The witnesses say it was tremendous, and drowned out his crops. The engineer, McDowell, says that no system of drainage could prevent that, and the neighbours who gave evidence say that all were affected in that section in the same way, whether their lands were affected by the drains or not.

There is no finding anywhere either, (1) that there were no damages before 1912, or (2) that there were no damages in 1912 before the service of the notice. The express statement that Parsons is entitled to damages sustained only after the notice is a statement of law.

It will be seen that in the notice two distinct classes of claim are set out:—

(1) Original malconstruction, secs. (a), (c), (d), (e).

(2) Negligent up-keep or "nonrepair," secs. (b), (f).

As to the second class, sec. 80 (2) of the Municipal Drainage Act, R.S.O. 1914, ch. 198, provides that the municipality whose duty it is to maintain and keep in repair a drainage work, shall not be liable "by reason of the nonrepair of such drainage work, unless and until the service . . . of notice . . .;" there is no such provision respecting the first class.

That the first class is such as gives a right to complain is obvious—some of the cases are collected in Proctor (Drainage Acts, Ontario), pp. 171, 172—and such may be passed on by the Drainage Referee under sec. 98. The application of sec. 98(3) need not here be considered: that may be passed on by the Referee. But the damages, if any, accruing to the appellant before the service of the notice under sec. 90, must, it seems to me, be determined and not passed over as not allowed by the law.

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The death of His Honour makes it, in that view of the law, impossible to do anything other than set aside the award: we, therefore, allow the appeal and set aside the award, with costs here and below.

NOTE.—I have now read the judgment of my brother Middleton, and I agree that the reasons may be read as part of the award. I would refer to the following cases, in addition to those cited: *Price* v. *Jones* (1828), 2 Y. & J. 114; *Jones* v. *Corry* (1839), 5 Bing. N.C. 187; *Mills* v. *Society of Bowyers* (1856), 3 K. & J. 66; *Lockwood* v. *Smith* (1862), 10 W.R. 628; *Williams* v. *Jones* (1829), 5 Man. & Ry. 3; *Wade* v. *Malpas* (1834), 2 Dowl. 638.

Latchford, J.

LATCHFORD, J., agreed.

Middleton, J.

MIDDLETON, J.:—I do not desire to add to what my brother Riddell has written, save to deal with one aspect of the case, which appears to me to be of practical importance. My brother Hodgins in his judgment considers that it must now be regarded as settled that reasons accompanying an award cannot be looked at upon a motion against the award.

That it is the duty of the Court to set aside an award where an error in law appears upon the face of the award cannot now be disputed, and the case of *Kent* v. *Elstob*, 3 East 18, determined that, where the arbitrator gives his reasons in a memorandum accompanying the award, error in law may be shewn by reference to these reasons.

Lawrence, J., there says: "It is not necessary that the arbitrator's reasons for making his award should appear upon the face of it, in order to enable the Court to examine them. Here there is no doubt what the arbitrator's reasons were, he having himself delivered them in writing to the parties, as the grounds of his decision, from whence it clearly appears that he has mistaken the law upon which he meant to proceed." And Le Blanc, J., says: "The paper in question was delivered, together with the award, by the arbitrator, as containing his reasons for coming to the conclusion which he did; we must therefore take them to be such, as much as if they were inserted in the award itself: and this could only have been done for the purpose of enabling any

party who was dissatisfied with the award, to take the opinion of the Court upon the validity of those reasons."

In the later cases I can find nothing to shew any departure from this principle, but only a steady refusal on the part of the Court to extend the class of cases in which the award can be attacked so as to allow the alleged error to be shewn in some other way.

In *Sharman* v. *Bell* (1816), 5 M. & S. 504, it was sought to shew the arbitrator's opinion from his conduct and remarks during the course of the reference.

In *Leggo* v. *Young*, 16 C.B. 626, the umpire wrote a letter to one party stating that he would have given him his costs of the submission had empowered him. This was said to be "a very different case from" *Kent* v. *Elstob*, where the reasons "substantially formed part of the award and were intended so to do." A mere letter to one of the parties should not "be taken notice of, or be permitted to operate against the deliberate decision."

In *Hodgkinson* v. *Fernie*, 3 C.B.N.S. 189, it was attempted to shew the arbitrator's reasons by affidavits. *Kent* v. *Elstob* was cited and discussed. Williams, J., after referring to the general rule that the decision of the arbitrator is conclusive both on the law and the facts, adds: "The only exceptions to that rule are cases when the award is the result of corruption or fraud, and one other, which, though it is to be regretted, is now, I think, firmly established, viz., where the question of law necessarily arises on the face of the award, or upon some paper accompanying and forming part of the award."

It is quite clear that this was not intended to modify in any way the law as laid down in *Kent* v. *Elstob*, but was intended to be a summing up of the law in a way which recognised that decision.

In *Hogge* v. *Burgess* (1858), 3 H. & N. 293, affidavit evidence was again rejected—one of the parties swore that the arbitrator had admitted his error in law—Watson, B., saying (p. 298): "If the mistake appears on the face of the award, or is disclosed by some contemporaneous writing, the Court will set aside the award."

*Holgate* v. *Killick*, 7 H. & N. 418, was a case like *Leggo* v.

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*Young*. An arbitrator wrote a letter to one party. This, it was said, was a "contemporaneous writing;" to which Wilde, B., said (p. 419): "By 'contemporaneous writing' is meant some writing attached to and forming part of the award." Bramwell, B., says in delivering judgment (p. 419): "I am not dissenting from anything which was said in *Hogge* v. *Burgess*, or by the King's Bench in *Kent* v. *Elstob*, where it was held that a paper delivered contemporaneously with the award formed part of it. Those decisions were right upon the facts." Wilde, B., adds that the Court will not look at anything except the "award or some paper so connected with the award as to form part of it."

In *Duke of Buccleuch* v. *Metropolitan Board of Works* (1871), L.R. 5 H.L. 418, an attempt was made to examine the arbitrators with the view of ascertaining the grounds of their decision. After much diversity of opinion, it was held that this could not be permitted.

In *Dinn* v. *Blake*, L.R. 10 C.P. 388, there was an attack upon an award, based upon an affidavit shewing a statement, in conversation by the arbitrator, of his reasons. It was said this statement shewed a mistake in law. The Court in dismissing the motion said: "The Court will not, in case of a mistake, send the award back without an assurance from the arbitrator himself that he is conscious of the mistake and desires the assistance of the Court to rectify it."

All this is said of a mistake not appearing on the face of the award, and has no reference to the question now in hand. The cases were not referred to, save *Hodgkinson* v. *Fernie*, concerning which it is said that "the law was clearly declared in the judgment of Williams, J."

*In re Keighley Maxsted & Co. and Durant & Co.*, [1893] 1 Q.B. 405, was a motion to remit on the discovery of new evidence. Much is said as to the conclusive effect of the award, but Lord Esher recognises the exceptions and states them (p. 410): "Where there has been corruption or fraud, where there is a mistake of law or fact apparent on the face of the award, and where the arbitrator himself admits that he has made a mistake"—thus shewing that *Dinn* v. *Blake*, *supra*, and other simi-

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lar cases have added an exception to those stated in *Hodgkinson* v. *Fernie, supra.*

*McRae* v. *Lemay*, 18 Can. S.C.R. 280, adds nothing. The award is conclusive and final—save in the three excepted cases stated by Sir W. J. Ritchie, C.J., in almost the same words as those just quoted—the second being "where the question of law arises on the face of the award or upon some paper accompanying and forming part of the award."

*Re Laidlaw and Campbellford Lake Ontario and Western R.W. Co.*, 19 D.L.R. 481, was an unsuccessful attempt to invoke the doctrine in *Dinn* v. *Blake*, failing because, while one arbitrator admitted a mistake, the other denied it.

In *Hall* v. *Ferguson* (1835), 4 O.S. 392, Robinson, C.J., Sherwood and Macaulay, JJ., accept *Kent* v. *Elstob* without question, the latter adding (p. 400): "The spirit of other cases and principles of rational justice would seem to warrant an inspection of the agreement between the parties, touching the subject-matter of the controversy, as being referred to in the paper, stating the basis and principles of the umpirage, and as indispensable to a correct understanding of those principles; beyond this (unless for the extraneous purpose of impugning the conduct of the umpire . . . ), I fear the Court is not at liberty to explore."

KELLY, J.:—I agree in the result arrived at in the judgment of my brother Riddell, and for the reasons he has stated. It is of importance, however, that some disposition should be made of the question raised in the judgment appealed from as to the propriety, on a motion attacking an award, of referring to the arbitrator's reasons accompanying the award. On the numerous authorities which I have carefully considered, I have reached the same conclusion as my brother Middleton has expressed in his judgment. The award, in my opinion, should be set aside.

Kelly, J.

*Appeal allowed.*

## GARIEPY v. GREENE.

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*Alberta Supreme Court, Harvey, C.J., Scott, Stuart, and Simmons, JJ. May 4, 1915.*

1. APPEAL (§ VII I—345)—REVIEW OF FACTS—DISCRETION OF TRIAL JUDGE. The appellate court will not review the discretion of the trial judge unless there has been a disregard of principle or misapprehension of facts, even where leave to appeal has been granted.
[*Young* v. *Thomas*, [1892] 2 Ch. 134, followed.]

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GARIEPY v. GREENE.

Harvey, C.J.

APPEAL from a judgment of the trial Judge.

*J. H. Wallbridge*, for plaintiff, respondent.

*O. M. Biggar*, K.C., for defendant, appellant.

HARVEY, C.J.:—I am somewhat at a loss to understand why the added defendants should have been made parties. The order was made on the application of the original defendants upon the affidavit of one of them swearing that the plaintiffs were aware of the proposed new defendants' interest. I can quite see why, under these circumstances, the plaintiffs might have desired to have them as party defendants because otherwise they might be unable to obtain all the relief that may be available to a plaintiff after default to redeem under a judgment for specific performance. I can also see that the proposed new defendants might desire to be made parties to protect their interest, but in this case the plaintiffs opposed the application and the new defendants though not moving to set aside the order adding them, expressed their opposition to it by asking to be dismissed out of the action which application was granted without any opposition by the plaintiffs.

The right of a defendant to have another person added as a party defendant against the will of the plaintiff was in question in *Rex* v. *Royal Bank* (1911), 3 A.L.R. 480.* In that case at the time of the appeal the added defendant was himself asking to be made or continued a party. The Court was of opinion that he had a right to come in to protect his own interest, but there is no suggestion that the defendant has a right to have as co-defendant someone against whom the plaintiff wishes to make no claim and who does not desire to protect any interest of his own and against whom, moreover, in this case even the defendant does not and cannot make any claim.

As far as the record shews, all the added defendants did in this case was to deliver a formal defence submitting their rights to the Court, and appear formally by counsel at the trial. I am of opinion that this was nothing more than they might properly do. If so they ought not to be obliged to pay their own costs when the trial Judge has found that they are not needed in the action and his decision in this respect has not been questioned.

*[See also *R.* v. *Royal Bank*, 9 D.L.R. 337, with annotation.]

The plaintiffs ought not to be required to pay for they have been forced against their will to add them. This leaves no one but the original defendants, and it would seem right that they should pay, for they had them added for no one's benefit or pleasure as the result shews other than their own.

Then looking at it in another aspect. If they had been made parties by the plaintiffs they would, I think, be justified in defending in the action so far as might be necessary to see that their rights were protected. The plaintiffs ought not to be required to pay their costs. The action is necessary because of the default of the original defendants and they ought therefore to pay all the costs made necessary by reason of their default. If the added defendants were themselves in default they might be liable to the original defendants for damages and the costs incurred might be part of the damages, but whether they are in default is not in issue here. They have alleged in their defence that they are not, but there is no issue between them and the original defendants and that is a matter of no importance as between them and the plaintiffs. In the evidence put in by the plaintiffs is a portion of the examination for discovery of one of the original defendants during which his counsel made a statement that $20,000 of a $50,000 instalment past due had been paid by the added defendants. It is evident that this is nothing more than an admission that that much had been paid and as such admission is evidence against the counsel's clients, but it cannot be evidence to any greater extent and as far as the record shews, the added defendants were not represented on the examination for discovery. The party being examined, however, does state that of this $20,000 which was paid, they paid less than $10,000 to the plaintiffs upon an instalment of $40,000 due on the same day. It may be that if they had paid the remainder the plaintiffs would have given them time and not brought the action, and no costs would therefore have been incurred.

Apart from this, it appears to me that the question of payments by the added defendants is not a matter for consideration here. It is the default of the original defendants which is the cause of the action, and that is the only default therefore to

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be considered, and the only default of which there is proper evidence. If they can excuse it by alleging another default so as to escape the consequences of their default to the extent of any of the costs occasioned by it, then it ought to enable them to escape them as to all of the costs occasioned by it.

However, even if I differed from the learned trial Judge in the view he took I would be of opinion that this Court should not interfere with his discretion.

In *Young* v. *Thomas*, [1892] 2 Ch. 134, it was held that the Court of Appeal will not review the discretion of the trial Judge even though there has been leave to appeal unless there has been a disregard of principle or misapprehension of facts. In that case the plaintiffs were entitled, under the rules, to such judgment as in the statement of claim the Judge considered them entitled to, there being default of defence. The Judge gave judgment in favour of the plaintiffs but refused them costs because they had brought several actions which the Judge considered unnecessary and oppressive. Leave was given to appeal as in this case.

The Court of Appeal held that the rule under which the order was made did not deprive the Judge of his discretion as to costs, and dismissed the appeal. Lindley, L.J., at p. 136, says:—

> There being no want of jurisdiction in the Judge if we were to accede to the present appeal we should be substituting our discretion for the discretion of the Judge in the Court below which we have no right to do. Even though leave has been given to appeal this Court will refuse to review the exercise of the discretion of the Judge. . . . The Judge has exercised his discretion, and there being no error in point of law, we must decline to review his discretion.

Even if I were of opinion that the added defendants ought not to have incurred any costs that would be only a matter of opinion and not a question of law, for error in which the discretion as to costs should be reviewed. Perhaps it was unnecessary to defend, but a cautious man does not wish, nor should he be compelled to take chances. The action against them was dismissed which *primâ facie* entitles them to costs. The judgment in that respect has not been questioned, and surely it cannot be said that it is not an act of discretion to decide whether they shall have the costs to which they are *primâ*

*facie* entitled, and if so by which of the other parties they shall be paid. I would dismiss the appeal with costs. I agree with my brother Scott as to the disposition of the cross-appeal.

SCOTT, J.:—This is an appeal by the defendants Greene, Long and Ferris from that part of the judgment of Ives, J., directing the payment by them of the costs of their co-defendants.

The action was originally instituted by the plaintiffs against the appellant defendants alone upon an agreement entered into by them for the purchase of certain lands from the plaintiffs, default having been made in the payment of a portion of the purchase money and interest.

The appellants subsequently applied for and obtained an order adding their co-defendants as defendants in the action, leave being given to the plaintiffs to amend their statement of claim as they might see fit. The order was obtained upon the affidavit of defendant Ferris to the effect that the land in question had been sold by the appellants to the defendants sought to be added, prior to the commencement of the action, and that the plaintiffs had knowledge that they had an interest in the land and of the nature of their interest.

The plaintiffs amended their statement of claim and the only reference therein to the added defendants was contained in paragraph 8 which is as follows:—

> 8. The defendants Appleton, Knight and Driscoll claim an interest in the land hereinbefore described in respect of an alleged agreement for sale of the said lots entered into between the defendants Greene, Long and Ferris, and the said Appleton, Knight and Driscoll, the terms and conditions of which are unknown to these plaintiffs, and the said Appleton, Knight and Driscoll are called for any interest they may have in the premises.

The plaintiffs by their amended statement of claim claimed by way of relief: (1) Specific performance of "the said agreement for sale;" (2) Payment of the balance of the purchase money and interest alleged to be due them; (3) In default of payment, rescission, sale or foreclosure; and (4) Forfeiture of the moneys paid by the original defendants.

The defendant Appleton did not enter a defence to the action. The only defences raised by the defendants Driscoll and

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Knight were, that there was no privity between the plaintiffs and them, and that they were not in default under their agreement with the original defendants, and they submitted themselves to the protection of the Court.

The defendants Appleton, Driscoll and Knight appeared by counsel at the trial. The only part the latter took in the proceedings at the trial was to contend at the close of the plaintiff's case that the action ought to be dismissed as against his clients and to object, while defendant Ferris was under examination, to any evidence being given against his clients.

The trial Judge dismissed the action as against Appleton, Driscoll and Knight with costs which he directed should be paid by defendants Greene, Long and Ferris. By his judgment he declared that the plaintiffs were entitled to specific performance of the contract entered into by the last named defendants and he directed that, upon payment by them within 6 months of the balance of the purchase money and interest, they should be entitled to a transfer of the lands. Leave was reserved to the parties interested to apply in Chambers as they might be advised.

It is idle to consider what was the object of the original defendant in seeking to add their co-defendants as parties to the action, although it is not unreasonable to presume that their object may have been to put upon record that their co-defendants had notice of the proceedings in the action. The fact that, at the time the action was commenced, the payments due by the latter under their contract to purchase were in arrear to the extent of over $30,000, and that the instalments payable by them were contemporaneous with those payable by the original defendants to the plaintiff may have prompted the original defendants to make the application as, had the added defendants paid the amount due by them, the original defendants would have been in a position to pay the purchase money due to the plaintiffs and thus the necessity for the latter bringing this action might have been avoided.

Apart from the question of the propriety of the original defendants making the application referred to it appears to me that, except as to the costs occasioned by the amendment which

must be paid by them to the plaintiffs in any event, the effect of the order was to place the parties in the same position as they would have been in had the plaintiffs originally instituted their action against all the present defendants. It should not be imputed to the original defendants that, in seeking the amendment, they desired that the plaintiffs should make any claim against the added defendants, other than that they should be bound by the proceedings in the action. That they, the original defendants, had merely this object in view appears by the affidavit on which their application was founded, and, if the plaintiffs have made any personal claim against the added defendants, the original defendants should not, in my view, be held responsible for such a claim.

In my opinion, however, the amended statement of claim does not shew that any such claim was intended nor can it be gathered from its language as it clearly shews the nature of the added defendants' claim and clearly states the reason for their being added. It does not disclose any grounds for claiming a personal judgment against the added defendants, and, upon it, the Court could not award such a judgment against them.

Although the defendants were added by the original defendants for their own purposes it appears to me that their being added, instead of operating to their prejudice, was in their interest. I think it may be assumed that, under their contract with the original defendants, they had the right to come in and protect their interest in the property by paying the amount due the plaintiff and the costs of the action and in doing so receive the protection of the Court in respect of that interest. Had they not been made parties they might not have notice of the proceedings in the action under which the property might be sold, thus depriving them of their right to acquire it.

In view of the fact that the evidence shews that they were not desirous of protecting their interest, but were, on the contrary, willing to sacrifice the amount paid by them on account of their purchase money on condition that they were relieved from any further liability under their contract, and, in view of the nature of the defences raised by them, I cannot avoid the

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conclusion that it was unnecessary for their protection that they should have entered a defence to the action or to have appeared at the trial. I have already expressed the view that no relief was claimed against them and they had no cause to shew why the plaintiffs should not obtain the relief claimed against the original defendants. Such being the case they should not have interfered in the action, and having interfered unnecessarily, they should not be entitled to costs.

Even if I am wrong in holding as I do that the statement of claim discloses no cause of action or claim against the added defendants, the facts disclosed upon the application shewed that the plaintiffs were not entitled to make any claim against them, and, if they did so, the original defendants should not be saddled with the costs of such a claim. If the added defendants are entitled to costs by reason of such a claim, the plaintiffs should pay them.

Under Order LXV., Rule 1, the costs of the proceedings in an action are in the discretion of the trial Judge, but it is well settled that the discretion must be properly exercised and that, when it is exercised upon a wrong principle, his direction may be overruled. If I am right in the view I have expressed, the added defendants should not have appeared in the action or incurred any costs and, therefore, the award to them of costs for unnecessary proceedings was upon a wrong principle and should be reversed.

For the reasons I have stated, I would allow the appeal with costs, and direct that the judgment in the Court below should be amended by deleting that portion thereof which directs that the costs of the defendants Appleton, Driscoll and Knight should be paid by their co-defendants.

The plaintiffs gave notice of cross-appeal on the ground that the trial Judge erred in directing payment of interest at the rate of 5 per cent. upon arrears of purchase money instead of at the rate of 7 per cent., being the rate prescribed by the agreement of sale. Counsel for the original defendants consented that the judgment should be amended by providing for payment of interest at the latter rate, and, as counsel for the plaintiffs admitted that, upon these defendants being served with the

notice of cross-appeal, their solicitors admitted that the plaintiffs were entitled to the amendment, there should be no costs of the cross-appeal.

Stuart, J.

STUART, J.:—I think if I had been trying this action I should probably not have made the order as to costs which is appealed from. Either the added defendants wished to be present in the action to protect their interests or they did not. If they did desire to be present, then they should be thankful to the original defendants for bringing them in. If they did not desire to be present to protect their interests, then all they had to do was not to appear. If it be said that they had to meet a claim there was certainly no claim made against them by the original defendants. There was no reason in the world for their appearing except to defend themselves against some claim by the plaintiffs. In any view of the meaning of the amended claim filed by the plaintiffs, I find difficulty in seeing why the original defendants should have been made to pay their costs. But the learned trial Judge took a different view and two members of this Court agree with him. The awarding of costs is a matter of discretion, and I am unable to say that in this case there has been either a misapprehension of facts or disregard of principle: *Young* v. *Thomas*, [1892] 2 Ch. 137. I therefore concur in dismissing the appeal.

Simmons, J.

SIMMONS, J., concurred with HARVEY, C.J.

*Appeal dismissed.*

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## THAMES CANNING CO. v. ECKARDT.

*Ontario Supreme Court, Middleton, J. May 1, 1915.*

1. CONTRACTS (§ I E 1—65)—STATUTE OF FRAUDS—SALE OF GOODS—RECEIPT AND ACCEPTANCE.

The receipt of a shipment of goods from the carrier and taken into the buyer's warehouse where they are examined and rejected, constitutes an actual receipt and acceptance sufficient to take the transaction out of the Statute of Frauds.

[*Page* v. *Morgan* (1885), 15 Q.B.D. 228; *Taylor* v. *Smith*, [1893] 2 Q.B. 65, followed.]

2. SALE (§ I B—6)—RIGHT OF INSPECTION—EXTENT OF—ARRIVAL OF GOODS AT DESTINATION.

Where goods are sold through a broker, and the seller undertakes to deliver goods of a particular quality to a carrier to be forwarded to the buyer at a distant place, to be paid for on arrival, the right of inspection continues till the goods arrive and are accepted at their ultimate destination, namely, the buyer's warehouse.

[*Thomson* v. *Dyment* (1886), 13 Can. S.C.R. 303, distinguished.]

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3. SALE (§ 1I A—25)—WARRANTY OR CONDITION—STIPULATION AS TO QUALITY AND PACKING—FOOD ARTICLES.

A buyer who contracts to purchase food articles of a certain quality to be packed in a certain manner purports a condition not a warranty, and he cannot be compelled to accept the articles not so packed or be liable for their contract price, unless from the conduct of the parties a new contract can be implied.

Statement

ACTION to recover the price of goods alleged to have been sold and delivered.

*J. M. Pike*, K.C., for plaintiffs.

*O. L. Lewis*, K.C., for defendants.

Middleton, J.

MIDDLETON, J.:—The beans in question were sold by a broker, Mr. Somerville, who says that the transaction was evidenced by bought and sold notes. On the question of fact, I think I must find that there were not any sale notes. Mr. Somerville does not say that he ever sent a sold note to the vendors. He does say that he sent a bought note to the purchaser, but he does not say that the bought note was signed. On an earlier transaction there was a proper sale note, and he kept a carbon copy, apparently prepared in the ordinary course of his business. If there was a note of this sale, one would have expected him to be able to produce a copy or to explain what had become of it. It is most unlikely that a bought note should be sent to the purchaser while a sold note was not sent to the vendors. The truth seems to be that Mr. Somerville's memory has played him false, and that the only document which existed was the shipping instructions sent by him to the canning factory. This memorandum, I think, so far as it goes, correctly sets forth the transaction. The 700 cases of golden wax beans were sold at $1.30 per case, less an allowance for labels which were to be placed upon the tins by the purchasers, making the net price f.o.b. at the factory $899.84. The goods were shipped as contemplated by the contract, and delivered to the carrier and received from the carrier and taken into the defendants' warehouse, where they were examined; so that there was an actual receipt and acceptance sufficient to take the case out of the Statute of Frauds; for, to constitute an acceptance within the statute, all that is necessary is, that there should be such a dealing with the goods as to recognise the existence of the contract. A receiving into the warehouse and an examination to ascertain if the goods are in accordance with the contract, is enough, even though the

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goods are immediately rejected as not being in accordance with its terms: *Page* v. *Morgan* (1885), 15 Q.B.D. 228; *Taylor* v. *Smith*, [1893] 2 Q.B. 65.

Although nothing appears on the face of the shipping instructions, the goods were in fact sold as first class goods of the highest grade, and it was known that it was the intention of the defendants to sell these goods, under their own labels, to retail merchants, as goods of the highest quality.

Concerning the beans themselves there is no complaint; but first class canned goods should be packed in clean, bright, new tins. The packing of these goods was defective. I was unable to learn whether the tins had been originally defective or had become defective while in the plaintiffs' possession. From the way in which they were said to have been handled I rather suspect the latter. The tins were certainly not clean, bright tins; they were scratched and battered with innumerable small dents, so that, as one witness put it, they looked like second-hand tins. Another witness described the appearance as that of hammered brass. A more serious defect was the fact that the tins had evidently been kept in a moist place and had become rusty, and an endeavour had been made to improve the condition by covering the heads of many of the tins with a greenish lacquer, and other tins had been painted with an aluminum paint. While to some extent this concealed the rusty and dirty condition, it gave to the tins an appearance of antiquity and renovation which undoubtedly would be most prejudicial when they came to be placed upon the retail market. These doctored tins were scattered throughout all the cases, constituting perhaps 20 per cent. of the whole; an additional 20 per cent. being disfigured by the battering and rust.

This careless treatment of the tins in which the goods were contained undoubtedly degraded the goods and seriously impaired the merchantability of the packages, rendering them quite unfit for the purpose for which they were bought, namely, the labelling with Mr. Eckardt's "Monarch" brand and the placing of them on the market as goods of the highest grade.

The goods were not inspected at the time of shipment. No notice was shewn to have been given of the time when the goods

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would in fact be shipped. As soon as they arrived at Mr. Eckardt's warehouse, the defective condition was revealed, complaint made, and the goods rejected. Mr. Thomas, who succeeded Mr. Somerville in his agency, quite agreed that the complaint was justified, and from the evidence of the practical men called before me I am of the same view.

Then it is said that the place of inspection was the point of delivery, and that, no inspection having taken place there, the purchaser cannot now object, and that he must keep the goods, relying upon a cross-action or counterclaim for damages by reason of the defective quality.

In considering this question it must be kept in mind that this is not a mere warranty, but a condition. In Smith's Leading Cases, 11th ed., vol. 2, p. 28, is a statement accepted as accurate in Blackburn's Contract of Sale, 3rd ed., p. 541, in which the position is clearly stated: "Where the subject-matter of the sale is not in existence, or not ascertained, at the time of the contract, an engagement that it shall, when existing or ascertained, possess certain qualities, is not a mere warranty but a condition, the fulfilment of which is precedent to any obligation of the vendee under the contract, because the existence of these qualities, being part of the description of the thing sold, becomes essential to its identity, and the buyer cannot be forced to receive and pay for a thing different from that for which he contracted."

In this way the case resolves itself into the old and familiar situation. The Court cannot make for the parties a contract they have not themselves made. The defendants, who contracted to purchase beans in bright, clean, new tins, cannot be compelled to accept any beans not so packed, unless from their conduct there can be implied a new contract so to do.

Now, the rule as to what is to be implied from a failure to inspect at the place of delivery is by no means as drastic as the plaintiffs contend. It is thus stated in Benjamin on Sale, 5th ed., p. 753: "The buyer's opportunity of inspection *primâ facie* arises at the place of delivery; but it need not necessarily be the place of delivery, for the contract may expressly or by implication provide that the time for inspection shall be subsequent

to delivery, and the place of inspection shall be different from that of delivery."

It is to be noticed that this does not speak of an obligation of the purchaser alone; it is "the opportunity of inspection;" and this implies as great an obligation on the part of the vendor to afford an adequate opportunity of inspection as it imposes a duty on the purchaser to avail himself of the opportunity to then and there inspect.

The judgments of Brett, J., in *Heilbutt v. Hickson* (1872), L.R. 7 C.P. 438, and *Grimoldby* v. *Wells* (1875), L.R. 10 C.P. 391, justify not only the text but this comment.

*Pierson* v. *Crooks* (1889), 115 N.Y. 539, accepted by the editors of the last edition of Benjamin (5th ed., p. 755), as good law, illustrates this well. Iron was sold in Liverpool f.o.b. there. The iron sent was not of the quality agreed. There was no inspection at Liverpool, but rejection at New York. The Court of Appeals held: "The fact that the buyers had no agent at Liverpool, and that the sellers could ship on board vessels selected by themselves without notice to the buyers of the name of the ship or of the time of shipment, shewed that Liverpool was not the place of inspection; for the *primâ facie* rule is that where a seller undertakes to deliver goods of a particular quality to a carrier to be forwarded to the buyer at a distant place, to be paid for on arrival, the right of inspection *primâ facie* continues till the goods arrive and are accepted at their ultimate destination."

In *Fogel v. Brubaker* (1888), 122 Penn. St. 7, the Supreme Court of Pennsylvania, dealing with the case of goods sold without being seen by the purchaser, where the vendor has undertaken that they shall be of given quality or description, and the goods have been delivered to a carrier, thus defines the rights of the parties (p. 15): "It is true that a delivery to the carrier is for many purposes a delivery to the purchaser, but such delivery is constructive merely. The obligation to accept or reject the article arises, however, only upon an actual delivery. It is when the articles come under the observation of the purchaser and he is able to see whether they are such as he has ordered, that he is bound to elect whether to accept them or not. It is not his duty to go to the point where delivery is made to the

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carrier, to inspect the articles before their shipment; for he has a right to rely on the good faith of the seller who has undertaken to fill his order, according to its terms, and ship to him by the ordinary modes of transportation, and when the articles reach him is the first time at which examination is practicable, and is the time contemplated by the contract. If the articles upon reaching their destination are not found to be such as the contract calls for, the seller has not performed on his part, and has no right to ask performance to any extent from his vendee. It was his own folly or fraud to ship an article not ordered."

In *Molling and Co.* v. *Dean and Son Limited* (1901), 18 Times L.R. 217, Lord Alverstone, C.J., delivering the judgment of a Divisional Court, adopted a similar principle. A German firm supplied books, some of which were to be sold in England and some in America. It was held that the inspection and rejection might take place in America, although the books were delivered to carriers in Germany.

*Dyment* v. *Thompson* (1885-6), 9 O.R. 566, 12 A.R. 658, *S.C., sub nom. Thomson* v. *Dyment* (1886), 13 Can. S.C.R. 303, is naturally much relied upon by the plaintiffs, and is undoubtedly binding upon me; but on carefully considering this case it will be found that the decision is in accordance with the principle as indicated. There the sale was of a very large quantity of lumber. No place was named for the delivery or inspection. It was, however, received at the mill; and under all the circumstances the proper implication was that the inspection and rejection must have been understood to have been contemplated to take place at the point of delivery. Manifestly this is so in the case of a commodity such as lumber, where every board must be subjected to scrutiny. It could never have been contemplated that all that was tendered by the vendor should be carried away from the mill before there was in fact an election by the purchaser to accept or reject. This case was thus regarded by the Court of King's Bench of Manitoba, presided over by Chief Justice Killam, in *Lewis* v. *Barré* (1901), 14 Man. R. 32, 38, where he says: "The *ratio decidendi* in all the Courts seems to have been that the place of inspection was at the mill of the manufacturer."

For these reasons, I determine that the goods were not of the

stipulated quality nor in accordance with the contract; that they were not merchantable as first class goods nor fit for the purpose for which they were sold; that the right of inspection existed at the time the goods were inspected in the warehouse; and that, upon inspection, they were at once rejected for adequate cause.

The action therefore fails. If I should be in error in this, I would assess at $250 the difference in value between goods contracted for and goods supplied.

*Action dismissed with costs.*

## STANDARD TRUSTS CO. v. TREASURER OF MANITOBA.



*Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Davies, Idington, Duff, Anglin, and Brodeur, JJ. May 18, 1915*

1. CONSTITUTIONAL LAW (§ IIA 4—211)—SUCCESSION DUTIES—DOMICILE ONE PROVINCE—PROPERTY IN ANOTHER—CONTROL.

Where a party dying, domiciled in Manitoba, has by a verbal agreement contracted to erect elevators in another province, but is to retain possession and control over them until they are fully paid for, the debt thus created constitutes "property" within Manitoba and is subject to succession duty under the Succession Duties Act, R.S.M. 4 and 5 Edw. VII. ch. 45, sec 4.

[*Re Muir Estate*, 18 D.L.R. 144, affirmed.]

2. CONSTITUTIONAL LAW (§ IIA 4—211)—AGREEMENT FOR SALE—SASKATCHEWAN—PARTY DOMICILED MANITOBA—TITLE NOT TO PASS TILL PAID FOR—SUCCESSION DUTIES ACT.

Agreements for sale of lands in Saskatchewan, in the possession of a party domiciled in Manitoba at the time of his death, by which he was to remain the owner of said lands until they were fully paid for, are specialty debts, and as such constitute property and are liable to succession duty there.

[*Marryat* v. *Marryat*, 28 Beav. 224, and *Isaacson* v. *Harwood*, 3 Ch. App. 224, applied.]

Statement.

APPEAL from the judgment of the Court of Appeal for Manitoba, 18 D.L.R. 144, 24 Man. L.R. 310, affirming the judgment of the Judge of the Surrogate Court.

*W. R. Mulock*, K.C., for the appellants.

*Wallace Nesbitt*, K.C., and *R. B. Graham*, for the respondent.

Sir Charles Fitzpatrick, C.J.

SIR CHARLES FITZPATRICK concurred in the judgment, dismissing the appeal with costs.

Davies, J.

DAVIES, J.:—In this appeal important questions were raised not only as to whether the Succession Duties Acts of the Province of Manitoba were *ultra vires* the Legislature of that province on the ground that the duties they imposed were *indirect* taxation, but also, in case the acts were *intra vires* the Legislature, whether certain properties consisting of debts due to the testator at the time of the death, from parties some of whom were residents of Manitoba and others of whom resided abroad, were sub-

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ject to the provisions of the Act. In the latter case, the contention was that these debts were "specialties," and for that reason were so subject. As to the "Little debt," it being a simple contract debt and both debtor and creditor being residents of Manitoba, it could have no local situation other than the residence of the debtor, where the assets to satisfy it would presumably be and would be *bona notabilia* within Manitoba, where he resided: *Commissioners of Stamps* v. *Hope*, [1891] A.C. 476, at 482, cited with approval in *Rex* v. *Lovitt*, [1912] A.C. 212, at 218.

As to the debts due or claimed in respect of the lands near Kirkella, in Saskatchewan, being specialty debts, by reason of the recital in the several agreements of sale and purchase entered into by the testator with certain purchasers under seal, I have come to the conclusion that these debts are not "specialties" which come within the meaning of the principle, "*mobilia sequuntur personam.*" I think the rule laid down in *Marryat* v. *Marryat*, 28 Beav. 224, and in *Isaacson* v. *Harwood*, 3 Ch. App. 224, applies to these agreements of sale, and that no covenant to pay can be implied from the mere recital. The agreements did not contain any express covenant to pay the purchase money, and the only question is whether one must be implied from the recital. I cannot understand how such an implication could create such a "corporal existence" with respect to this debt as would change its locality and make the debts "conspicuous" within the jurisdiction where the agreement happened to be found with the testator at the time of his death. But in any case, and supposing the rule to be as applicable to the case of an implied as of an express covenant to pay, it remains a pure question of the construction of the agreements. What did the parties intend? If they intended that the recital should operate as a covenant, then the debtor would be liable accordingly. But it seems to me clear that the recital was not inserted for the simple purpose of acknowledging a debt by a deed under seal without any other object declared by the deed in which case a covenant to pay might be implied. On the contrary, the object and purpose of the agreement was to create a binding contract for the sale of a piece of land and to shew how and when the purchaser was to complete the payments of the purchase money, in order that he might obtain his title. As to the intention of the parties, the fact that the agreements do contain express

covenants as to money that might be expended by the vendor in paying insurance rather goes to shew that, where it was intended there should be a covenant to pay moneys under the agreement, it was so expressed. Those agreements, even if a covenant to pay the purchase money could be implied from the language of the recital, are not, I agree with Perdue, J.A., of the Court of Appeal, like money bonds, scrip or mortgages containing express covenants to pay money, etc. Before the executors could have any right to recover the purchase moneys under these agreements, they would have to obtain probate of the will in Saskatchewan and have the lands transmitted to them in accordance with the statute of that province. They have no rights under the agreements until they have put themselves in a position to perform the vendor's obligations under them. They could not recover the purchase moneys until they had obtained power to convey the lands to the purchaser, and they could only obtain such power by having their probate of the will re-sealed in Saskatchewan, the statutory equivalent of taking out ancillary probate there.

These instruments are mere agreements for the sale of land in Saskatchewan and involve mutual obligations on the part of vendor and vendee which can only be performed under the laws of that province, and which cannot be enforced by the appellant executors until they have first complied with those laws.

The most important question, however, still remains, namely, whether the Succession Duties Act of the Province of Manitoba was *intra vires* of the Legislature of that province.

The contention on the part of the appellant was that the construction to be put upon this Act and other similar succession duties Acts of the different provinces of the Dominion was decided by the Judicial Committee in the recent case of *Cotton* v. *The King*, 15 D.L.R. 283, [1914] A.C. 176. In that case it was held that the Quebec Succession Duties Acts did not impose duties upon the transmission of movable property outside of the province, and that the taxation imposed by them on such property was not direct taxation within the meaning of the British North America Act, and was, consequently, *ultra vires* the Legislature of the province.

If this contention as made by the appellants was sustained, of course this appeal should have to be allowed, and the results in

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the several provinces of the Dominion would be most serious and disquieting.

I have reached the conclusion, after a very careful study of this decision of the Judicial Committee in the *Cotton case*, 15 D.L.R. 283, [1914] A.C. 176, that it does not warrant the broad contention stated above.

The language made use of by Lord Moulton, who delivered the judgment, in parts of his judgment dealing with the transmission of movable property outside of the province, was very broad and general, and would seem at first sight to justify the conclusion that all succession duties Acts of the several provinces necessarily violated the constitutional prohibition against provincial indirect taxation.

I do not think, however, their Lordships intended by any means to go that far or, indeed, to go any further than the specific question then before them required them to go. The language used by Lord Moulton must be read as only having reference to this special question they were in that case called upon to decide, namely, whether the Quebec Legislature imposed succession duties or had power to do so upon the transmission of movable property outside of the province.

In the *Cotton case*, 15 D.L.R. 283, [1914] A.C. 176, the duties had been levied upon two estates: first, on that of Charlotte L. Cotton; and, afterwards, on that of her husband, Henry H. Cotton, whom Charlotte predeceased.

A distinction was attempted to be made between the law as it stood at the death of Charlotte L. Cotton and as it was afterwards amended and stood at the death of Henry H. Cotton, and it was there contended that the amendment defining the meaning of the term "property" expressly included

all movables *wherever situate*, of persons having their domicile or residing in the province of Quebec at the time of their deaths.

Their Lordships, however, were of the opinion that this amended definition of the word "property" did not enlarge the express language of the operative clause of the Act, which provided that of this property (that is, the property made subject to the duties) those portions only are taxed which are "*biens situés dans la province.*"

Dealing with this Act before it was amended and with reference to Charlotte L. Cotton's estate, His Lordship says, at p. 286:

No question arises as to the applicability of the doctrine *mobilia sequunter personam*, because the section expressly limited the taxation to property in the province, and, therefore, whether or not the province possessed and might have exercised a right to tax movable property locally situated outside of the province (such right arising from the domicile of the testatrix), it did not see fit so to do. For the same reason no question of *ultra vires* arises in this part of the case, since the appellants do not dispute the power of the Quebec Legislature to tax movable property situated in the province.

Dealing next with the Act after it was amended and with reference to Henry H. Cotton's estate, he says:—

The same consideration which was decisive in the former case (Charlotte L. Cotton's), therefore, applies with equal force here.

His Lordship having thus disposed of the appeal with respect to the claims for succession duties on each of the two estates, on the ground that the statute either as originally enacted or as subsequently amended did not authorize the taxation of movable property situate outside of the province, went on to consider whether the succession duty imposed would be within the definition of an indirect tax if it be taken that the duty was imposed on all the property of the testator *wherever situate*—that is, on the assumption that the limited words, "property situate within the province," were deleted from the operative taxing section.

After quoting a number of the sections of the Act, he concludes that they only can be construed as

entitling the collector of Inland Revenue to collect the whole of the duties on the estate from the person making the declaration under oath of a complete schedule of the estate required by the sections quoted and who must recover the amount so paid from the assets of the estate or, more accurately, from the persons interested therein.

Taking as an instance the facts of the case then before him of movables in New York bequeathed to one domiciled in Quebec, and stating that there was no accepted principle in international law to the effect that nations should recognize or enforce the fiscal laws of foreign countries—and that in such a case the legatee would, on duly proving the execution of the will, obtain the possession and ownership of such securities, after satisfying the fiscal laws of New York relating thereto, he asks: How then would the provincial Government, in such case, obtain the payment of the succession duty? And answers his question by saying that it could only be from some one who was not intended himself to bear the burden, but to be recouped by some one else, and that

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such an impost appeared to their Lordships plainly to lie outside the definition of direct taxation accepted by this Board in previous cases.

To assume that by this judgment the Judicial Committee intended to reverse many previous decisions of the Board, which had held, either expressly or by necessary implications, that succession duty statutes, properly framed and imposing taxes on movable or other property within the province, were *intra vires* the Legislatures which enacted them, would be unjustifiable.

In the case of *Rex* v. *Lovitt*, [1912] A.C. 212, their Lordships expressly held, at p. 223, that the statute of New Brunswick there in question

was intended to be a direct burden on that property (*i.e.*, taxable property within the province) varying in amount according to the relationship of the successor to the testator.

Nothing is said in the judgment of the Board now under review calling in question this declaration of the intention and effect of the New Brunswick Succession Duties Act. The only reference made to that case is as follows:—

In the case of *Rex* v. *Lovitt*, [1912] A.C. 212, no question arose as to the power of a province to levy succession duty situated *outside the province*.

And so in regard to *Woodruff* v. *A.-G. for Ontario*, [1908] A.C. 508, the decision of the Judicial Committee in which, when the *Cotton case*, 15 D.L.R. 283, [1914] A.C. 176, was before us, I considered as binding upon us, and followed, the only remark they made is that

the circumstances of the case were so special and there is so much doubt as to the reasoning on which the decision was based that their Lordships have felt that it is better not to treat it as governing or affecting the present decision.

But not a suggestion that the Ontario Succession Duties Act, so far as it levied taxes upon property within the province, was *ultra vires* the Legislature.

Assuming, therefore, I am correct in my understanding of the decision reached by their Lordships in the *Cotton* case, 15 D.L.R. 283, [1914] A.C. 176, I come to the Manitoba Succession Duties Act as it stood amended at the death of the testator Muir and under which the taxes in dispute in this case are levied. With respect to the "Kirkella lands" of the testator, situated in Saskatchewan, and the debts arising out of the agreements for the sale thereof, I have already expressed my opinion that they do not come within the Act and are not taxable.

And with regard to the subject matter the statute deals with,

I am of opinion that it is direct taxation and not indirect. I accept the definition of direct taxation as "one which is demanded from the very person whom it is intended should pay it," and I think that the taxes sought to be imposed by that statute are such.

It is the estate that must pay the tax and it is the estate upon which the statute imposes the liability. The fact that the executor or the administrator is the channel through which the estate makes payment cannot make the tax indirect. He represents the estate. It is, in fact, by the law of Manitoba, all vested in him, and in paying the duties when he does so, he acts merely as the agent or person in charge of the estate.

The question is one of intention or expectation. Did the Legislature either expect or intend that the executor or administrator should pay money out of his own pocket and afterwards take his chances of recovering it back from the legatee or beneficiary to whom the property was bequeathed or who by law became entitled to it?

The statute answers the question, I think, in its 15th and 16th sections, which read as follows:—

15. Any administrator, executor or trustee, having in charge or trust, any estate, legacy or property subject to the said duty shall deduct the duty therefrom, or collect the duty thereon upon the appraised value thereof, from the person entitled to such property, and he shall not deliver any property subject to duty to any person until he has collected the duty thereon.

16. Executors, administrators, and trustees shall have power to sell so much of the property of the deceased as will enable them to pay said duty in the same manner as they may be or are enabled by law so to do for the payment of debts of the testator or intestate.

Here executors and trustees are classed together. They are to deduct the duty from the property under their charge or which they hold in trust or collect it from the beneficiary, and are forbidden to deliver any property subject to duty to any person until the duty is collected. They are given power to sell so much of the property of deceased as will enable them to pay the duty in the same manner as they may do to pay the debts of the testator or intestate. If the property is of a character enabling them to deduct the duty they do so. If it is not, they collect the duty from the beneficiary or sell so much of the property as will enable them to pay the duty. But there is neither an intention nor an expectancy that they would pay, nor an obliga-

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tion imposed upon them to pay the duty out of their own moneys and take the chances of recovering it back from the beneficiary.

It must be remembered that in Manitoba the executor or administrator is by statute made for the time being the owner of all the property of the deceased testator or intestate, as the case may be. Section 21 of the Devolution of Estates Act, as enacted by 5 & 6 Edw. VII., ch. 21, sec. 1, and sec. 20 of the Wills Act, R.S.M. 1902, ch. 174.

But, of course, he only holds it for the purpose of administering the estate, and, as I have shewn, is expressly empowered by sec. 16 of the Succession Duties Act to sell the property to pay the tax.

Section 5 of that Act says:—

Save as aforesaid, the following property shall be subject to a succession duty as hereinafter provided.

and sub-sec. (*a*) says:—

All property within this province and any interest or income therefrom

shall be liable to the duties. Section 6 provides for the filing by the executors or administrator, before the issue of letters probate or grant of administration,

of a full itemized inventory of all the property of the deceased person and the market value at the death of such deceased person,

and goes on to provide either for the payment by the executor or administrator of the duties called for by the Act or for the delivery of a prescribed bond conditioned for the due payment of any duty to which the property coming to the hands of such executor may be found liable.

I conclude that the duties under this Act were to be, as they were determined by the Judicial Committee to be in the *Lovitt case*, [1912] A.C. 212,

a direct burden on the property varying in amount according to the relationship of the successor to the testator,

and so to be burdens which the Legislature had authority to impose.

I would, therefore, vary the judgment appealed from by excluding from the property subject to duty the debts arising out of the agreements for the sale of the "Kirkella lands" in the Province of Saskatchewan as not being specialties within the rule, and with this variation I would dismiss the appeal, but without costs.

IDINGTON, J.:—The question of jurisdiction raised at the opening of the argument herein is, in my opinion, so far from being beyond doubt, that, if either party had taken or maintained the objection, I think we should have refused to exercise so doubtful a jurisdiction.

The parties hereto seem tacitly agreed we should act. Hence we may be justified in ignoring the doubt, though, if that consent be our only right to hear them, the result may be a non-appealable judgment such as appears in *A.-G. of Nova Scotia* v. *Gregory*, 11 App. Cas. 229.

It is upon the amendment of 52 Vict., ch. 37 (D.), alone that our jurisdiction, if any, must rest. It seems, in one way of reading it, possibly wide enough to confer jurisdiction in any case relative to what is involved in the probate of wills. But is the question to be determined herein at all of that nature? It may be that the Legislature, in the due exercise of its plenary power over civil rights in a province, can say, as a condition precedent to anything being done in its Courts, constituted by it with such limitations of authority as it has seen fit to confer, that such Courts shall not hear the application for probate unless and until the tax for transmission has been secured and hence make the refusal to grant or granting of probate dependent thereon. But what has all that to do with the plain primary meaning of a "Court of Probate" acting as such or how can it bring this appeal within that term as used in the amending Act?

I take the phrase, "Court of Probate," in the sense indicated, for example, in *Pattison's Trustees* v. *Edinburgh University*, 16 Ct. of Sess. Cas. (4th ser.) 73, 75*n*, referred to in vol. 4, p. 437, of Stroud's Judicial Dictionary.

But if all the judgments pursuant to any of the powers assigned to and exercised by said Courts (called "Surrogate" in Ontario and the Western Provinces) in a variety of ways beyond the mere granting or refusing of probate were to be held reviewable here whenever involving $500, then it seems singular that this Court has not been troubled ere this with some such case as might fall within the ambit of that view.

It is not the work of the Court when acting in hearing the application for probate that we are herein asked to pass upon.

The Maritime Provinces have called their Courts dealing with such matters "Courts of Probate," and a number of appeals

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resting upon said amendment have come from there, but none involving any mere collateral matter without touching upon what is, properly speaking, the work of a Court of Probate has been cited in argument herein.

That is a remarkable result if the expression is to be held as covering anything else done in or by said Court than what I suggest. It is to be observed that the case of *Lovitt* v. *The King*, 43 Can. S.C.R. 106, came here by virtue of a case stated for the Supreme Court of New Brunswick.

The exclusion of Quebec (where there are no Courts bearing the name "Probate," but the Superior Court in certain cases discharges the duty involved) from the operation of the Act rather clearly indicates we should not attach too much significance to the name, but look at the substance, and confine appeals within the limits which that indicates.

Having thus indicated the reasons for my doubt, I accept what seemed, on the argument, to be the opinion of the majority of this Court as to its jurisdiction as binding me, and accordingly proceed to pass upon the questions raised by the appeal.

I have no doubt as to the power of the Legislature, resting upon its plenary power over not only the property in a province, but also civil rights in a province and the constitution of the Courts therein and limitation of their powers, to enact a law such as before us imposing a tax as a condition precedent to giving its assent through its Courts to the transmission of any property so far as such assent may be necessary in law.

It is argued that it is not a direct tax because the executor has not the money to pay it, and in the first place gives a bond for its due payment, and the amount payable thereunder depends upon a number of considerations set forth in the legislation, and the modes of inquiry and determination also thereby provided for, and that the executor has to recoup himself out of the estate when realized and when debts and expenses are paid. All these things constitute but the legal machinery for the determination of the facts and the scale by which the tax is to be measured. Those beneficiaries sharing with the state in that which the executor may have realized, I rather think, feel that the tax is pretty direct. They know that the executor or other personal representative is but their agent, as it were, by whose hands they receive what they get, and that he has no civil right in the

province to assert any acquisition of the property of the deceased, but what the Legislature has chosen to give assent to. I repeat, we must look at the actual substance of things, and not be misled by mere words.

If and so far as the person becoming ultimately entitled under this process to receive his share in the estate of a deceased can obtain by law any of it without provincial legislation that property so obtained may not be taxable. No such proposition in law or in fact is or can be put forward relative to what is in dispute herein; therefore, I am, for clarity's sake, resolved not to travel into side issues and other cases.

There are only two items in question herein. That known as the claim against one Little, residing in the province, clearly is not only in the province and dependent upon the civil right conditionally conferred by the province, but is also collectable there. And if his assets have to be followed elsewhere, it is only by virtue of that civil right so conditionally given that they can be followed.

The other item is a specialty debt held by deceased at his domicile in Manitoba, enforceable there if the debtor had any property there, and wherever to be enforced must be dependent upon the same civil right also conditionally conferred by the province.

I hold that there is in the contract in question a covenant for the payment of said debt. And even if the purchaser of the land, for which it is given, has to be constrained, by virtue of his necessity to get a title, to pay, and that, upon the facts, should happen to be efficacious as a means of enforcing payment, it is to Manitoba he must come to discharge his debt and there tender a conveyance for execution.

I can conceive of the like cases where the balance unpaid might so far exceed the value of the land as to render the covenant of no value and the recovery of the land be the only thing available. No such thing is set up here, except incidentally arguing that there is no covenant; I, therefore, need not follow that alternative.

The appellant's counsel tells us there is required by the law of Saskatchewan an ancillary probate to be got there to complete the title to the purchaser. That is the purchaser's business. If there is required by Saskatchewan law anything beyond the

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nominal expense of producing such verification as to obtain registration, and thus in the nature of a second succession tax, then I should be sorry to find such legislation in any province. It is the vicious practice of insisting upon such double taxation that has aroused some antagonism to these succession taxes. I am glad to see that the Legislature of Manitoba has been moving in the direction of trying to avoid the evil. The merely reprehensible nature of legislation producing such evil should have no weight in measuring the right and power of the province. And every attempt on the part of the Courts to ameliorate such incidental evil results by way of needlessly limiting and cutting down the power given by the B.N.A. Act to provincial Legislatures weakens the forces which would otherwise be directed to enlighten public opinion and produce in the Legislature a proper consciousness of the unrighteousness of such methods.

There is only one thing involved in this case for us to deal with, and that is the power of the Legislature. All such collateral arguments as bear upon the abuse of the power should be discarded, and we will thereby be the better able to reach a clear apprehension of what that power is.

The basis of the right to tax the transmission was expressed by Lord Loreburn, in *Winans* v. *Attorney-General*, [1910] A.C. 27, at 30, as follows:—

> In both cases the property received the full protection of British laws, which is a constant basis of taxation, and can only be transferred from the deceased to other persons by a British Court.

I admit that some recent decisions and dicta in other judgments, if followed to their logical conclusions of measuring the civil rights in a province by the consequences thereof when having to be dealt with abroad, would so abridge the rights and powers of provincial Legislatures as to revolutionize the fundamental principles upon which the Legislatures and judiciary of this country have for a lifetime proceeded. For my part, I shall not attempt to build upon the foundation so laid until, if ever, it has reached such further development as to become by concrete decisions absolutely identical in principle with that we have to pass upon.

In regard to the argument founded upon such decisions and the supposed logical result thereof, I should adopt and apply here the language of Lord Halsbury in the case of *Quinn* v. *Leathem*, [1901] A.C. 495, at 506.

This case does not fall within that category. It is well within the principles proceeded upon in the case of *Bank of Toronto* v. *Lambe*, 12 App. Cas. 575, where the Court above, referring to the application of the definition of scientific political economists as limiting the powers of principal Legislatures over direct taxation, at p. 582, spoke as follows:—

> It would deny the character of a direct tax to the income tax of this country, which is always spoken of as such, and is generally looked upon as a direct tax of the most obvious kind; and it would run counter to the common understanding of men on this subject, which is one main clue to the meaning of the Legislature.

Not only the income tax, but much else of local taxation that has hitherto passed unchallenged, would have to be revised if some such definitions had to be rigidly adhered to as the measure of the provincial Legislatures' powers instead of the common sense of mankind, as recognized in what I quote and the recognized legislative powers of other colonies in this regard.

It is further to be observed that it is not direct taxation of property within the province, but direct taxation within a province, that is the term used in the B.N.A. Act. If people can get property of a deceased outside the province without asking or relying upon provincial authority, then they may escape the tax.

Counsel for appellant complained that a schedule had to be filed shewing the entire estate of the deceased. That is simply as the basis of classification and for the determination of whether or not the deceased and his estate and those getting it fall within the class who could reasonably be asked to contribute to the public revenue. That may in some cases rank the estate as of those which should pay 10%, for example, instead of 5%, or nothing. The severity of it may in many cases be unwise and unjustifiable, but that has nothing to do with the existence of the power. It is merely the scale upon or by which the tax is to be measured.

If we had to clarify the legislative mind on the subject of taxation or to pass upon the merits of its product relative to taxation, we should have perhaps a pretty heavy task. Some notions apparent in the work may occasionally seem to us to be crude.

But for us to tell the legislators that, when using this exclusive power of the B.N.A. Act over civil rights, they must, in the

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case of the beneficiaries by the death of one who has grown rich under the laws of his domicile, perhaps by virtue thereof, be careful that the power over civil rights be not used, but the law be so framed as to offer him a premium at the close of life to invest his acquisitions abroad, and thereby escape the tax which probate duty, legacy duty, succession tax or death duty, or whatever other name be given the tax, would be apt to bring a sharp retort.

To try to distinguish between these names accidentally given in the course of the development of a century or more of law in England tends only, I submit, to lead to confusion. The purpose of the Legislature has plainly been to so use its power over civil rights and to insist upon its right to withhold its needed sanction to give him claiming such benefits as derivable therefrom, unless and until this tax is paid. So acting, I think the Legislature is well within its powers within the province.

I think, therefore, the appeal should be dismissed with costs.

Duff, J.

DUFF, J.:—I think this appeal should be dismissed. The statute, in so far as it professes to impose duties in respect of property having a *situs* within Manitoba, must be held, I think, to be *intra vires* on the authority of *Rex* v. *Lovitt*, [1912] A.C. 212. In so far as it professes to impose duties on property not having a *situs* within the province, it must, I think, be held to attempt the imposition of taxes which are not "direct" taxes, because it appears to me that, as regards that feature of it, the reasoning of Lord Moulton, in *Cotton* v. *Rex*, 15 D.L.R. 283 at 293, applies; and the result of that reasoning is, I think, that any attempt on the part of the province to exact succession duties in respect of property not situate within the province and without respect to the domicile of the beneficiary must fail for the simple reason that such taxation, if effectual (in cases in which —the *situs* of the property being, let it be noted, outside the province—the beneficiary is domiciled abroad, as well as in other cases) cannot be "direct taxation" within the meaning of that phrase as construed in that case.

I have had not a little difficulty in satisfying myself upon the point whether the provisions of the Act which bring personal property outside the province under the incidence of the duty ought not to be considered as of the essence of the statute in such a degree as to make it impossible to sustain the duty upon pro-

perty within the province; after a good deal of doubt, I have come to the conclusion that it is possible, in this case, and right to treat the provisions of the statute, which, if enacted by themselves, would have been valid, as severable from those provisions which are *ultra vires*.

ANGLIN, J.:—The appellants challenge the right of the Province of Manitoba to recover succession duties from them as executors of the late Robert Muir, who died domiciled in Manitoba, in respect of certain debts known as the "Little debt" and the "Kirkella lands debts," which formed part of the assets of his estate. It is asserted that these debts are not dutiable because they are not "locally situate" within the province; and that, whether they are "locally situate" within or without the province, the legislation authorizing the tax imposed is *ultra vires*.

Proceeding under sec. 19 of the Manitoba Succession Duties Act (R.S.M. 1902, ch. 161), the Surrogate Court of the Eastern Judicial District of Manitoba held the appellants liable to pay these duties. This judgment was affirmed by the Court of Appeal for Manitoba.

At the threshold of the appeal to this Court there arises a question of jurisdiction. Is the Surrogate Court of Manitoba, admittedly not a superior Court, a "Court of Probate" within the meaning of clause (*d*) of sec. 37 of the Supreme Court Act? This provision was introduced by 52 Vict., ch. 37. It had been held in *Beamish* v. *Kaulbach*, 3 Can. S.C.R. 704, that this Court had not jurisdiction to entertain an appeal in a case which originated in the Court of Wills and Probates of the County of Lunenburg, Nova Scotia. Having regard to the special provision made in sec. 96 of the B.N.A. Act in regard to the Courts of Probate in the Provinces of Nova Scotia and New Brunswick and to the history of the Surrogate Courts in Ontario, upon which the surrogate Courts of Manitoba appear to have been modelled in their constitution and jurisdiction (R.S.O., 1913, ch. 62; R.S.M., 1902, ch. 41), there would seem to be some ground for the suggestion that, if its application is not confined to the Probate Courts in the two former provinces, which have always been styled "Courts of Probate," such Courts as the Surrogate Courts of Manitoba are not within clause (*d*) of sec. 37 of the Supreme Court Act. If they are, a rather wide field of jurisdiction to entertain appeals in Surrogate Court matters would seem to be opened up.

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It is also suggested that in the proceedings provided for by the sec. 19 of the Manitoba Succession Duties Act those Surrogate Court does not act as a Court of Probate, or that those proceedings are taken before the Judge of the Surrogate Court as *persona designata* subject to a special right of appeal to the provincial Court of Appeal, and that there is, therefore, no right of appeal to this Court. While by no means entirely satisfied that we have jurisdiction to entertain this appeal, in deference to the opinions of my learned colleagues who think that we have jurisdiction, I shall proceed to consider the appeal on its merits.

In regard to the "Little debt," the unanimous conclusion in the provincial Courts, that, as a simple contract obligation, it was locally situate at the residence of the debtor in Manitoba, seems to me incontrovertible; and, while it has occasioned some divergence in judicial opinion, I am not prepared to differ from the view of the majority of the learned Judges of the Court of Appeal that the respondent's contention that the "Kirkella lands claims" are locally situate in Manitoba, because they are specialty debts, is also well founded: *Commissioners of Stamps* v. *Hope*, [1891] A.C. 476; *Emmens* v. *Elderton*, 4 H.L. Cas. 624, at 666-7; *Russell* v. *Watts*, 10 App. Cas. 590, at 611; *Aspdin* v. *Austin*, 5 Q.B. 671, at 683; *Farrall* v. *Hilditch*, 5 C.B.N.S. 840; *Lay* v. *Mottram*, 19 C.B.N.S. 479.

In *Cotton* v. *The King*, 15 D.L.R. 283, [1914] A.C. 176, the nature of succession duties imposed by the Legislature of Quebec was considered by the Judicial Committee. Although the case then before their Lordships might have been fully disposed of by the construction placed by them on the Quebec Succession Duties Act, which excluded the property in question from its purview, Lord Moulton, delivering the judgment of the Board, after stating the questions at issue—the one as to the construction of the Quebec statute, the other as to the nature of the taxation which it imposed—says:—

> These are the two questions which this Board has to resolve, and, though it may well be that the decision of one of these questions in favour of the appellants might render it unnecessary to decide the other, their Lordships are of opinion that they are of co-ordinate importance in the case, and that they should base their judgment equally on the answers to be given to the one and to the other. The latter of the two questions is of the greatest practical importance, in view of the fact that by a later statute the operative portion of the section has been amended by omitting the qualifying words, "in the province," so that a decision depending on

the presence of those words would have no application to the present state of legislation.

Their Lordships' opinion that, at least in regard to outside movables, the tax imposed by the Quebec Succession Duties Act would be indirect and the Act to that extent *ultra vires*, certainly cannot be regarded as *obiter dictum*. They have seen fit expressly to base their judgment upon it.

The liability to succession duties of movable property locally situate outside the province was the question at issue in the *Cotton case*, [1914] A.C. 176, 15 D.L.R. 283. Under the Quebec statute the person who made the schedule and declaration of the assets of the estate was held to be personally liable to pay the whole of the duties imposed on the estate (p. 293), and to be entitled to

recover the amount so paid from the assets of the estate, or, more accurately, from the persons interested therein.

This provision was dealt with as if applicable equally to assets outside and to assets within the province. As an illustration of the indirectness of the Quebec taxation, Lord Moulton instances the case of

bonds or shares in New York bequeathed to some person not domiciled in the province,

which the legatee could obtain on duly proving the will in New York and satisfying its fiscal laws in relation thereto, regardless of any duty imposed by the Quebec statute. "The Quebec Government," his Lordship adds,

could in such a case obtain its succession duties only from some one who was not intended himself to bear the burden, but to be recouped by someone else. Because the payment is obtained from persons not intended to bear it, within the meaning of the accepted definition above referred to (John Stuart Mill's well-known definition of indirect taxation)

their Lordships held the Quebec legislation *ultra vires*, at all events as to movables situate outside the province, as imposing taxation which was not "direct taxation."

Section 5 of the Manitoba Succession Duties Act, as enacted in 1905 and in force in 1908, rendered the movable property of a domiciled decedent situate without the province, as well as all his property situate within the province, liable to succession duties. Section 15 provided that:—

Any administrator, executor or trustee having in charge or trust any estate, legacy, or property subject to the said duty, shall deduct the duty therefrom, or collect the duty thereon upon the appraised value thereof, from the person entitled to such property, and he shall not deliver any

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property subject to duty to any person until he has collected the duty thereon.

On obtaining grant of probate or administration, the personal representative was required by sec. 6 to execute and deliver to the surrogate clerk a bond

conditioned for the due payment to His Majesty of any duty to which the property coming to the hands of such executor or administrator may be found liable.

Giving to the words, "coming to the hands," their widest signification (*Batten* v. *Dartmouth Harbour*, 45 Ch. D. 612, at 622), having regard to the terms of sec. 15, it would seem to be at least arguable that the personal liability of the executor or administrator was confined to duties payable in respect of property of which he should be entitled to obtain possession under and by virtue of the Manitoba grant, as a condition of receiving which he was obliged to give the bond for payment of succession duties. If so, as to the duties on outside movable property the Manitoba statute would seem to be distinguishable from the Quebec legislation. But if the liability of the Manitoba executor or administrator should also extend to duties in respect of movable property of which possession could be obtained only under a foreign grant of probate or administration, or if outside movable property, though coming to the hands of the Manitoba executor or administrator, should be dealt with by a foreign Court in the manner indicated in Lord Moulton's illustration, no doubt the duties imposed upon it by the Manitoba statute would contravene the prohibition against indirect taxation equally with the duties considered in the *Cotton* case, [1914] A.C. 176, 15 D.L.R. 283.

Upon a careful study of Lord Moulton's opinion, however, although I certainly do not find that the view which I expressed in the *Cotton* case, 45 Can. S.C.R. 469, at pages 532 *et seq.*, was approved of in the Judicial Committee, neither do I find that it was overruled or even questioned. Their Lordships merely preferred to rest their conclusion that the taxation of outside property in that case was *ultra vires* upon another ground. Having had no reason to change or modify it, I respectfully adhere to my opinion that succession duties such as those provided for by the Manitoba statute imposed in respect of any property physically or locally situate outside the province are not "taxation within the province," and are, therefore, *ultra vires* of a provincial

Legislature. To that extent I think the Manitoba Succession Duties Act, as it stood in 1908, cannot be supported.

But I see no difficulty in severing the provision of that Act relating to the taxation of outside movable property from the rest of the Act. It is not essential to the scheme of the legislation. Neither the character, the incidence, nor the amount of the duties imposed on the property within Manitoba could be in any way effected by the excision of the provision for the taxation of outside movables. The only effects of deleting it would be that the province would receive a somewhat smaller revenue under the statute and the beneficiaries of outside movable property would escape the burden of the taxation.

After indicating the indirect character of the tax imposed by the Quebec statute by instancing the procedure requisite for its collection in the case of foreign bonds or shares bequeathed to a person not domiciled in the province, Lord Moulton proceeds to say:—

> Although the case just referred to is probably one of the most striking instances of the excess of these duties beyond the legal limits of the powers of the provincial Legislature, it is by no means the only one. Indeed, the whole structure of the scheme of these succession duties depends on a system of making one person pay duties which he is not intended to bear, but to obtain from other persons.

In this passage it seems to me that their Lordships condemn the Quebec succession duties as indirect taxation regardless of whether the property in respect of which they are levied is within or without the province.

But with regard to assets within the province the Manitoba legislation differs essentially from that of Quebec. Under the latter, as construed by the Judicial Committee, direct personal liability to pay the duties is imposed on a person who may never have any of the assets of the estate in his hands. Speaking of the sections of the statute which deal with the method of collection of the duties imposed upon the property of the decedent, Lord Moulton says:—

> Their Lordships can only construe these provisions as entitling the collector of Inland Revenue to collect the whole of the duties on the estate from the person making the declaration, who may (and, as we understand, in most cases will) be the notary before whom the will is executed and who must recover the amount so paid from the assets of the estate, or, more accurately, from the persons interested therein.

Under the Manitoba statute the only liability imposed, other than that upon the property itself, is upon the executor or ad-

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ministrator or trustee, and is confined to duties upon any estate, legacy or property which he has in charge or trust (sec. 15). Title to the entire succession of the decedent within the province vests in his personal representative. It is out of that which comes to his hands as personal representative that the executor or administrator is required to pay. He is empowered to collect the duty from the devisee or legatee before delivering over any property subject to duty and to sell so much of the property of the deceased as may be necessary to enable him to pay such duty (sec. 16). We have not, therefore, the case of one not intended to bear the burden being required to pay the duty and to recoup himself thereafter either from the assets of the estate or from the persons interested therein. The personal representative has imposed upon him the obligation of collecting for the province the duties imposed upon the property of the decedent which comes to his hands and is under his control. The security which he gives is for the faithful discharge of that duty. It is only upon default in fulfilling it that he incurs personal liability. To hold that such taxation is indirect merely because it is levied through the instrumentality of the personal representative seems to me not only to be something which the Judicial Committee did not decide in the *Cotton case*, 15 D.L.R. 283, [1914] A.C. 176, but to involve a limitation on the provincial power of direct taxation which would be largely destructive of it. Unless required to do so by a decision of their Lordships, or of this Court, much more directly in point, I am not prepared to accept that position. As to the duties imposed upon property locally situate within the province, the Manitoba Succession Duties Act, in my opinion, provided for

> direct taxation within the province in order to the raising of a revenue for provincial purposes,

and was, therefore, *intra vires* of the provincial Legislature.

I have not overlooked Lord Moulton's observations, at p. 292, that in the Quebec case "there is nothing corresponding to probate in the English sense," and at p. 293, that

> this (the payment of duties) is not in return for services rendered by the Government as in the cases where local probate has been necessary and fees have been charged in respect thereof,

or Lord Robson's remarks in *Rex* v. *Lovitt*, [1912] A.C. 212, at 223. I cannot think that their Lordships meant to suggest that the succession duties imposed by the New Brunswick statute,

which is in this respect indistinguishable from the Manitoba statute, were in the nature of probate fees, and, therefore, not to be deemed taxation. But, if they did, these expressions of opinion were *obiter*, and I am, with all proper deference, of the opinion that the duties imposed by both these statutes are not in any sense "fees charged in respect" of the grant of probate or administration. They are imposed in addition to and independently of the fees charged for these services—"over and above the fees provided by the Surrogate Courts Act." They are levied indifferently upon movable property within and without the province—upon all the decedent's property within the province to which title is conferred by the Manitoba probate or administration and upon his movable property without the province to which it confers no title. Their amount varies according to the degree of consanguinity between the decedent and the beneficiary and the amount of the estate. I deem these succession duties taxation—not fees payable for services—and as taxation subject to the restrictions of sub-sec. 2 of sec. 92 of the B.N.A. Act.

For these reasons I would, with respect, dismiss this appeal.

Brodeur, J.

BRODEUR, J.:—The first question to be determined is whether the debts in respect of which succession duty is claimed by the respondent are "within the Province of Manitoba."

There does not seem to be any serious difficulty as to the debt which is called the "Little debt." The deceased and the debtor were both residing in that province. It may be that Little has not in the province sufficient means to pay what he owes, but at the same time there is nothing to shew that he will not discharge his obligation. It is a simple contract debt due by a resident of the province, and it is liable to the succession duty claimed.

As to the debts due in respect of the "Kirkella lands," there is a more serious dispute. It is claimed by the appellants that they are not "property within the province," as required by sub-sec. (*a*) of sec. 5, ch. 161, R.S.M. (Succession Duties Act.)

The deceased, in his lifetime, owned certain lands in the Province of Saskatchewan, and they had been sold by him to different purchasers.

All those sales were evidenced by agreements for sale under

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seal, and those agreements were in the possession of the deceased in Manitoba at the time of his death.

These agreements for sale are specialty debts, and, applying the principle enunciated by Lord Field in *Commissioner of Stamps* v. *Hope*, [1891] A.C. 476, at 482, a debt under seal, or a specialty, has a species of corporeal existence by which its locality might be reduced to a certainty, and it is *bona notabilia* where it is conspicuous and is under the jurisdiction in which the specialty was found at the time of death.

Another very important question has been raised as to whether the Succession Duties Act is *intra vires*. It is claimed by the appellants, on the authority of the judgment rendered by the Privy Council in the case of *Cotton* v. *The King*, 15 D.L.R. 283, that the taxation imposed by the Succession Duties Act is indirect, and, therefore, beyond the powers of the provincial Legislatures.

It is true that the very wide and inclusive language used in some parts of that judgment might be construed in that way. But in the *Cotton case*, 15 D.L.R. 283, the question at issue was whether the Legislature of Quebec, in view of the restrictive language of sec. 92 of the B.N.A. Act, which gives to the provinces the power to impose "direct taxation within the province," could tax property situate outside the province.

At the time of his death the deceased, in the *Cotton case*, 15 D.L.R. 283, was domiciled in Quebec, but the provincial Government levied succession duties on bonds, debentures and shares that were all locally situate in the United States.

So the question that presented itself in that case was as to the right of a province to tax property situate outside of the province, and it is in connection with that feature of the case that the question of indirect taxation was raised. I do not think it was intended to declare that a province could not require, as a condition for local probate, that a succession duty should be paid on property within the province.

The appeal should be dismissed with costs.

*Appeal dismissed with costs.*

## SANDERS v. HEDMAN.

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*Alberta Supreme Court, Harvey, C.J., and Simmons, and Stuart, JJ.*
*May 4, 1915.*

1. FRAUDULENT CONVEYANCES (§ I—2)—SALE OF GOODS—WRITING AS TO TITLE RETAINED BY GRANTOR—VALIDITY BETWEEN PARTIES.

Where there has been no delivery of the chattels and there is an absence of consideration on a pretended sale for value as to which each signed a written acknowledgment, the pretended seller in whose possession the acknowledgments were retained is not debarred from setting up his title and property in the chattels by the fact that the pretense of a sale was made up for the purpose of defrauding creditors, if the writing entered into was not in itself effective as a conveyance to transfer the ownership.

Statement.

APPEAL from the judgment of the trial Judge, 18 D.L.R. 481.

*W. M. Chartres*, for plaintiff, respondent.

*Watt & Watt*, for defendant, appellant.

Harvey, C.J.

HARVEY, C.J.:—It was held by the trial Judge that the documents do not correctly state the transaction between the parties, and, as there is evidence to support that, I am of opinion that that must be accepted as a fact. It is clear that there was no actual physical change of possession of the property, and the trial Judge finds that the documents never passed out of the possession of the plaintiff. Unfortunately, by reason of infirmity of memory, the defendant's evidence is of no value. But, as I understand the effect of the plaintiff's own evidence, it is that it was the intention to dispose of his property in such a way as to prevent his creditor from being able to get any benefit from it, and that the documents were executed for the purpose of giving effect to that purpose. The trial Judge was of opinion that the property in the goods never passed, and that therefore the plaintiff still owned them. It seems clear that there could be no change of ownership without a change of possession, since the documents do not purport to be a conveyance but only a memorandum of a sale, which, of course, might have been made without writing.

The delivery of possession need not, however, be an actual one, but a constructive one may suffice: see Williams on Personal Property, 17th ed., pp. 72 and 3, and *Kilpin* v. *Ratley*, [1892] 1 Q.B. 582. In the last-mentioned case it was considered that what was done was all that could be done, and was therefore sufficient. Now, Sanders' cattle and other chattels were already on the defendant's land, and there could therefore be no actual, but only a constructive delivery of possession, and if they intended that the defendant's possession should thereafter be that of owner,

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that would constitute a constructive change of possession which would, it appears to me, be sufficient to transfer the property to the defendant, there being nothing more that could be done.

The plaintiff's intention to defeat his creditor could only be made effective by transferring the property or ownership to the defendant. The documents were no doubt executed to serve as evidence to prove that such a transfer of ownership had taken place. In my opinion the proper inference from the evidence is that the plaintiff had the intention to transfer the ownership, not in the sense that he *would do* it, but in the sense that he *was doing* it, and with the belief that it was done, and that in consequence he actually did it.

The fact that he retained the physical possession of the documents does not seem to me to be at variance with this conclusion, because he looked after all defendant's business, and there would be a constructive delivery of the receipt signed by himself, which would be subsequently held by him for the benefit of the defendant.

The ownership having once become vested in the defendant for the illegal purpose of defeating creditors, the Court will furnish the plaintiff no assistance in getting back his property. See *Scheuerman* v. *Scheuerman*, 21 D.L.R. 593, and the cases cited there, the division of opinion there being on the ground that in that case the creditors could not be injured. I would therefore allow the appeal with costs and dismiss the action with costs.

Simmons, J.

SIMMONS, J.:—The defendants appeal from the judgment of Mr Justice Scott, wherein judgment was given the plaintiff for $441 without costs, the value of certain cattle and implements wrongfully taken from the plaintiff and sold by the defendants.

The plaintiff and the defendant Hedman came to this province in 1903, and took up homesteads in the vicinity of Leduc. Hedman was then advanced in years, and intended to live the remainder of his life with the plaintiff. Sanders and Hedman worked and lived together on their adjacent homesteads for a number of years. The plaintiff mortgaged his homestead to a loan company when he obtained his patent, and, being unable to meet the mortgage, abandoned the property, and then lived upon Hedman's homestead until the occurrence of the transaction which is the subject matter of this action. Hedman was induced by Sanders to mortgage Hedman's homestead for $500, and

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Sanders received the proceeds of this loan and applied part of it in erecting a house on Hedman's homestead and in making other improvements upon it. The evidence discloses a very sordid tale of neglect and ill-treatment of Hedman by Sanders until Hedman, apparently preferring death to a continuance of the conditions under which he was compelled to live by Sanders, wandered away and was found by neighbours in a helpless and pitiable condition. At the trial Hedman was not mentally able to give a coherent account of his business relations and transactions with the plaintiff. He was taken care of by a neighbour—the defendant Ohrn, and he gave Ohrn a power of attorney, and Ohrn, in pursuance of this power of attorney, and accompanied by an officer of the R.N.W.M.P., removed the chattels in question from Hedman's homestead, and sold them.

The evidence of the plaintiff's ownership of the chattels is his statement that they were raised or purchased by him. When the search for Hedman was going on, an officer of the R.N.W.M.P. visited the house on Hedman's place where Sanders and Hedman had lived, and found an envelope in Sanders' writing desk, which contained a will made by Hedman in favour of Sanders, and also two written documents, which are as follows:—

Till whom it may concern. That I have this day sold all my personal property consisting of cattle, hogs, chickens and farm implements, till Louis Hedman for the sum of $300 and received pay for same.

(Sgd.) N. A. SANDERS.

Dated this 10th day of August, 1911. Witness (Sgd.) SWAN MONSON.

Till whom it may concern. That I have this day bought from N. A. Sanders all his personal property consisting of farm implements, cattle, hogs and chickens, for the sum of $300 and paid for same.

(Sgd.) LOUIS HEDMAN.

Dated this 10th day of August, 1911. Witness (Sgd.) SWAN MONSON.

The plaintiff says the documents in question were prepared by him to protect his cattle and implements from the owner of the mortgage on his land, as he considered the land worth more than enough to pay the mortgage and costs of foreclosure. The defendant Hedman says he never bought cattle or implements from the plaintiff, and that he never had any money, and says, "I never sold him anything, only told him to write on the name."

The evidence of the plaintiff is corroborated by the defendant that there was no consideration of $300 or of any sum, and that there was no sale or purchase of the chattels. There is nothing to support the claim of the defendants to the property except the

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documents in question, and since there was an absence of consideration, the defendant's claim that the documents in question constitute an assignment of the chattels, fails.

The learned trial Judge found that the only ground for the claim of the defendants that Hedman was the owner of the chattels was that the documents in question constituted an assignment by the plaintiff of his interest in the chattels to the defendant Hedman, and since the plaintiff admits the documents were executed to delay or defeat his creditors, the defendants contend that the Courts should not assist him in setting aside the transaction, even though made without consideration, and he expresses a doubt whether the documents did constitute an actual assignment; but even if they did constitute such an assignment, the purpose for which they were executed was not carried out, and, following *Taylor* v. *Bowers*, 1 Q.B.D. 291, and *Symes* v. *Hughes*, L.R. 9 Eq. 476, the learned trial Judge held that the illegal assignment (if there was such an assignment) did not prevent the assignor from recovering back his property. I do not think upon the facts it is necessary to discuss or decide whether the plaintiff could recover his goods alleged to have been sold or assigned to the defendant by the instruments in question, as in fact the goods never were in the possession of the defendant Hedman until, as found by the trial Judge, they were taken from the plaintiff by the defendants procuring an officer of the R.N.W.M.P. to accompany them in order to intimidate the plaintiff and prevent him from resisting their attempt to remove the chattels.

In view of this finding of the trial Judge, it is clear that any right to claim the property by the defendants was a right which must have existed prior to the forcible removal of the chattels.

The possession of the chattels up to that time had been in the plaintiff, and there is no evidence of any delivery of them to defendant, either actual or constructive. It is true they were on Hedman's homestead, but there is no evidence to sustain an inference that Hedman exercised any acts of possession or control over the chattels. There is likewise no evidence of delivery of the documents upon which the defendant Hedman relies. They were found in the plaintiff's desk, and had never left his possession.

It was suggested upon the argument before us, although not set up in the pleadings, that even though the documents in question

did not constitute an assignment, that these documents, together with the relations subsisting between Sanders and Hedman, warranted the inference that there had been a gift by Sanders to Hedman of the chattels in question. The absence of evidence of delivery, either actual or constructive, is fatal to this proposition: *Cochrane* v. *Moore*, 25 Q.B.D. 57, affirming *Irons* v. *Smallpiece*, 2 B. & Ald. 551, vol. 20 Cyc. Tit. Gifts.

I am not able to find any legal or equitable principle to support the defendant's claim. The documents do satisfy the proposition that there was in them an intention clearly expressed that when the occasion or necessity arose the plaintiff would use them to substantiate a sale of the chattels to Hedman. There is no evidence to indicate that the occasion or necessity arose for the carrying out of his expressed intention, and I fail to recognize upon what principle a party can be bound by the expression of an intention which has not been implemented by some act indicating the performance of the expressed intention.

I would therefore dismiss the appeal with costs.

Stuart, J.

STUART, J.:—I think this appeal must be dismissed. The action is for the recovery of certain chattels which the plaintiff claims to be his property. The defendant does not contend that he ever had any interest in the chattels except under and by virtue of two written documents which are quoted in my brother SIMMONS' judgment.

The defendant is a very old, weak-minded man, who was without relatives, and who came to the country along with the plaintiff and took up a homestead adjoining a homestead secured by the plaintiff. The plaintiff resided on his own homestead, apparently only to a sufficient extent to secure his patent. For eleven years he lived really upon the defendant's homestead, in a house built thereon, and the defendant also lived there. The plaintiff had a wife and daughter, but his wife had died. The plaintiff bought some cattle, of which the cattle in dispute were the progeny. These and the other chattels were kept on the defendant's homestead. The plaintiff had given a mortgage on his own homestead, and he stated that the documents in question were drawn up by himself for the purpose of protecting his chattels against any possible proceedings by the mortgagee. It was admitted by the defendant that there was no real sale, and that so far as he knew he had never bought any cattle from the plaintiff.

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The plaintiff swore that the documents had never left his own possession, and the defendant said that he signed the second document because the plaintiff asked him to do so.

Ultimately, owing to obvious ill-treatment by the plaintiff, the defendant left the place and wandered away in the woods. When he was missed the police were sent for to hunt for him, and a policeman came to the house and asked if there were any papers in connection with Hedman that he might see. The plaintiff then shewed him a will which had been made by the defendant in Sanders' favour. This will was in an envelope in a desk in the house. The plaintiff had been secretary-treasurer of the school district, and the desk was obviously his desk. The two documents above quoted fell out of the envelope, and the policeman, saying that they appeared to belong to Hedman, took them away along with the will. Hedman was found in a day or two, but would not return to the house. He went to the house of his co-defendant Ohrn, and Ohrn went with Hedman afterwards, accompanied by the policeman, who, as he asserted, merely went to keep the peace, and the chattels in question were taken away from the place and sold.

The plaintiff brought his action to recover the chattels or their value from Hedman and Ohrn. On his examination for discovery, the two documents were presented to him by counsel for the defendants, and he then explained their origin in the way mentioned.

The plaintiff swore that the documents had never left his possession, and the trial Judge so found, thus accepting his testimony. There was, indeed, no evidence to contradict this. I think it cannot reasonably be denied that the desk was the plaintiff's desk. The defendant did not speak of ever seeing the first document which was signed by the plaintiff. There is no suggestion in the case that the plaintiff ever attempted to use the documents in the way intended. All we have, therefore, is a document signed indeed by him, but retained in his possession, and only taken out of his possession by the interference, quite unnecessary, at least as it turned out, of the police.

The question is whether the effect of this is that the legal property in the cattle ever passed to the defendant. I am unable to conclude that it did. In a sale, the property passes when it is intended to pass, or if nothing indicates a contrary intention,

when the bargain is made, if the property is specific and in a deliverable state. But here there was admittedly no real sale and no intention that the property ever should pass. There may have been an intention that the parties should afterwards pretend that it had passed, but that is a different thing. Hals., vol. 22, pp. 404-6, shews the methods by which the property in chattels passes, but there is here no deed and no gift, no sale and no exchange under seal. If the document in question had been under seal the result might have been different, though even then the question of the delivery of the deed would still have to be considered. I can see nothing which effected a transfer of the legal property in the chattels to the defendant. The parties certainly never intended it to be transferred. The case is quite distinct from a conveyance of real estate or even of personal estate by deed executed and delivered, because in that case the grantor, in order to get rid of his own deed by suggesting a secret trust, may have to set up his own fraud, which the Court will not allow. In such a case the document has an external formal legal operation and effect which is to transfer the property or estate from one person to another. But with these documents, not being by deed delivered, it seems clear that the law cannot reach the result that the property was transferred except by considering the real intention of the parties, and that intention is here shewn to be quite the contrary.

Whatever may be one's opinion of the dastardly conduct of the plaintiff in his treatment of the defendant, I can see no reason for allowing a secret piece of paper which he has always kept to himself, which he never revealed to any one or attempted to make use of to any one's harm, to be dragged out of his possession by a policeman and then held up to the world as a revelation of what improper things he had been *thinking* of.

In my view it is going quite too far to say to the plaintiff:—

> By these means we have caught you preparing and signing a document and keeping it in your possession, and, as you now confess an evil intention on your part when you did that, therefore though you never went farther with your intention, we shall hold you to what you say in that document.

It seems to me that the only principle upon which it could be held that the property passed would be that of estoppel. But I cannot see how the mere request to Hedman to sign the one document can be said to have prejudiced him in any way. He was not led to alter his position.

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There does not seem to have been anything done by Sanders which indicated a withdrawal from dominion over the chattels so as to make out a case of constructive delivery. Certainly there had been, to say the least, a clear joint control, and Sanders did nothing which can be construed into a surrender of his part of the control into Hedman's hands. *Appeal dismissed.*

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## BRYMER v. THOMPSON.

*Ontario Supreme Court, Middleton, J. June 21, 1915.*

1. LANDLORD AND TENANT (§ II B 2—15)—LEASES—HEATED APARTMENTS—IMPLIED COVENANTS.

A lease of a steam-heated apartment carries with it an implied collateral promise to supply adequate heat.

[*Hamlin* v. *Wood*, [1891] 2 K.B. 488; *Ex p. Ford*, [1885] 16 Q.B.D. 305; *Lamb* v. *Evans*, [1893] 1 Ch. 218; *De Lasalle* v. *Guildford*, [1901] 2 K.B. 215, applied.]

2. DAMAGES (§ III A 3—63)—LEASE OF HEATED APARTMENTS—BREACH OF IMPLIED COVENANT BY LESSOR—MEASURE OF DAMAGES.

A breach of covenant by a lessor to furnish adequate heat will entitle the lessee to recover damages in respect of the loss of time of men employed by him and the extra cost of attempting to heat the leased premises, and also damages for the general loss and inconvenience resulting from the breach.

3. CONTRACT (§ I E 4—87)—LEASES—COLLATERAL AGREEMENTS—STATUTE OF FRAUDS.

A collateral promise at the time of the execution of a lease of land to heat the leased premises is not within the Statute of Frauds.

Statement

ACTION by the lessee against the lessor for damages caused by failure to provide adequate heating.

*G. N. Shaver*, for plaintiff.

*J. W. Bain*, K.C., and *J. M. Forgie*, for defendant.

Middleton, J.

MIDDLETON, J.:—Notwithstanding Mr. Bain's emphatic views, I think this case is simple, both upon the law and facts. The defendant owns the property known as 115 King street east. The property was in her husband's hands for management. As her attorney, he leased the basement and ground-floor to Mr. McArthur, and the lease contains a covenant on the part of McArthur to heat not only the floors leased but the remaining flats of the building. In consideration of this, the defendant agreed to pay for one-third of the fuel consumed. After the making of this lease, the defendant placed the leasing of the remaining floors in the hands of a real estate agent, who listed the properties as "steam-heated flats."

The only system of heating provided in the building was steam-heating; the steam for the entire building being generated

in two boilers in the portion leased to McArthur. There were coils for heating purposes throughout the entire building, and the system provided was entirely adequate for the contemplated purpose.

The plaintiff leased the top-flat of the building from the agent as a steam-heated flat, and it was undoubtedly the intention of all parties that the demised premises should be heated by the landlord. Mr. Thompson prepared a written lease of the flat, but the lease makes no mention of heating. This lease was signed by the plaintiff. During the currency of the lease, Thompson, or McArthur for him, did supply steam-heat, but the steam supplied was inadequate. This arose not from any defect in the heating plant but from inefficient operation. The plaintiff required to use his premises from the hour of 8 a.m. Steam was not supplied from the boiler in sufficient volume to reach the top-flat, and afford any appreciable heating, until after 9 o'clock. The result was that the workmen were unable to work during the first hour. These men had to be paid, as they were there ready to work; but their services were worthless, as they could not work owing to the low temperature of the factory.

Complaint was made to Thompson, and he in his turn complained to McArthur, but no satisfactory remedy was applied. This action is to recover damages. The answer made is that, there being in the written lease, or agreement for lease, as the case may be, no agreement to supply heat, there can be no recovery.

There is no merit whatever in the defence, and the evidence of the husband in seeking to evade liability impressed me as being disingenuous in the extreme.

Lord Esher, in *Hamlyn & Co.* v. *Wood & Co.*, [1891] 2 K.B. 488, asserts the rule that there is the right to imply a stipulation in a written contract where, "on considering the terms of the contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist." This is similar to what the same Judge said in *Ex p. Ford* (1885), 16 Q.B.D. 305: "It seems to me that whenever circumstances exist in the ordinary business

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of life in which, if two persons were ordinarily honest and careful, the one of them would make a promise to the other, it may properly be inferred that both of them understood that such a promise was given and accepted." It is similarly said by Bowen, L.J., in *Lamb* v. *Evans*, [1893] 1 Ch. 218: "What is an implied contract or an implied promise in law? It is that promise which the law implies and authorises us to infer in order to give the transaction that effect which the parties must have intended it to have and without which it would be futile."

I think there was here an implied promise and contract on the part of the landlord that the premises leased should be adequately and sufficiently heated; and, furthermore, I think that there is nothing in the fact that the case is one between landlord and tenant to render the law upon which I am acting inapplicable. *De Lassalle* v. *Guildford*, [1901] 2 K.B. 215, determines that a tenant can sue upon a collateral verbal warranty, and puts an end to the suggestion in earlier cases that there can be no suit on a warranty unless it is in the lease. *A fortiori*, there can be an action upon a collateral contract such as this.

Nor does the Statute of Frauds afford any answer, even if pleaded—and here it is not; for it is laid down in Halsbury's Laws of England, vol. 7, p. 383, that where there are two distinct agreements, one of which is and the other is not within the statute, the promise which is not required to be in writing to be within the statute may be enforced, even though it is not evidenced by a writing.

The claim for damages is put forth in somewhat peculiar form. The items for lost time of the men and the extra cost of attempting to heat by the gas-furnace are properly pleaded as special damages. The third item is probably not sufficiently pleaded as a claim for special damages with respect to lost business, and I propose to treat it as a claim with respect to damages for the general loss and inconvenience resulting from the breach of the implied contract.

I cannot help feeling that the damages claimed ought to be somewhat reduced. Considering the matter as best I can from all aspects, I think $750 is not an unfair amount to allow.

There will therefore be judgment for the plaintiff for this sum, with costs. *Judgment for plaintiff.*

## JONES v. SULLIVAN.

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*New Brunswick Supreme Court, McKeown, White, and Grimmer, JJ.*
*February* 19, 1915.

1. PUBLIC LANDS (§ I—10)—POSSESSION—TRANSFER TO OTHERS, POSSESSION CONTINUED—RIGHTS OF PARTIES.

Where a wharf had been built on land the title to which is vested in the Crown and the party in possession had used the property for many years in connection with a mill on the property, and subsequently transferred it to others who also went into possession, and continued to remain in possession; the parties so in possession have a good title against every one except the true owner, and cannot be dispossessed except by one shewing better title.

[*Asher* v. *Whitlock* (1865), L.R. 1 Q.B. 1; *Perry v. Clissold*, [1907] A.C. 73, referred to.]

Statement

APPEAL from the judgment of McLeod, C.J.

*H. A. Powell*, K.C., for defendants appellants.

*Fred. R. Taylor*, K.C., *contra*.

McKeown, J.

McKEOWN, J.:—This is an appeal from a decree of the Chancery Division of the Court, whereby it was ordered that plaintiff is entitled to certain wharf property situate upon the Miramichi river, in the parish of Nelson, in Northumberland county; also that defendants pay plaintiff the sum of 875 for damages done to a house belonging to plaintiff by a fire for which defendants were held to be responsible; and that costs of suit be paid by defendants. Plaintiff also asked for an injunction restraining defendants from using a certain mill in such a way as to cause injury to plaintiff, but for reasons set out in the judgment appealed from the injunction was refused.

The facts are that for some years prior to 1870, two brothers, John Flett and William Flett, operated a saw mill on the Miramichi river, in the parish of Nelson, in Northumberland county. This mill property was then owned by the Honourable J. B. Snowball. In the year 1867 William Flett died intestate, and it does not appear from the evidence by what tenure he and John Flett had held the property up to the time of William Flett's death, but in the year 1870 Mr. Snowball deeded the property to John Flett, the surviving brother, and by divers mesne conveyances it has now become vested in the plaintiff, who acquired it from the Bank of Montreal by deed bearing date August 19, 1910; the intermediate conveyances are all described or referred to in the judgment appealed from, and it is unnecessary to recite them here. The northern boundary of the property so conveyed is the Miramichi river, and it may be noted that the several grantors, commencing with Mr. Snowball, describe the westerly boundary

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of the said land as running northerly at right angles to the highway road, "to the channel of the said river," and they place or describe the northerly or river boundary of the lot as "thence" (*i.e.*, from the point where the western boundary meets the channel), "easterly down stream following the said channel until it meets a prolongation of the upper or westerly side line of the Fraser property . . . together with the wharf and mills standing or being upon or in front of the said premises," etc.

During the years of occupancy preceding plaintiff's acquisition of the property, a wharf had been built out into the river by the plaintiff's predecessors in title, or by some of them, and this wharf not only extends along the front of plaintiff's property, but continues easterly or down stream, and fronts the next adjoining lot, or part thereof now owned by defendant Sullivan, who also claims ownership of that part of the wharf which fronts his land. I gather from the testimony that this lower portion of the wharf extending easterly from plaintiff's side line is the most useful and valuable part of the structure, and it is this lower portion of the wharf that is in dispute in this case. Plaintiff's claim, in brief, is that this whole wharf was built by his predecessors in title, that it has always been held, possessed and used by them as a part of their property, that he himself, ever since he became seized of the property, has held possession of it, that it passes to him by the conveyances as being a wharf "in front of the said property," and also, that as the wharf structure rests on the river bed, the title to which is in the Crown, he (plaintiff) being in possession, has a right to hold it against defendants who shew no title, and whose possession, such as it is or is claimed to be, was acquired subsequent to plaintiff's actual possession.

The defendant rests his title upon a deed to him from George C. Flett and others, heirs of Helen Flett, deceased, dated May 29, 1913, and duly registered in the records of Northumberland county on the thirty-first day of the said month of May. This deed describes the land thereby conveyed to defendant as abutted and bounded as follows; "Southerly or in front by the said highway, on the lower or easterly side by the upper or westerly side line of the said Michael Monahan's lands and a prolongation thereof, on the upper or westerly side by the lands and premises known as the Thomas W. Flett mill property, conveyed by the said Thomas W. Flett to the Thomas W. Flett Lumber Company, Limited,

and now owned by Robert Jones, and extending northerly into the Miramichi river as far as the said parties hereto of the first part own the same or have any right thereto."

Mrs. Helen Flett acquired the lands above described by a deed of partition made between her and Thomas W. Flett, dated August 23, 1901, and duly registered on October 25, 1902, in which deed this property so conveyed is described as being bounded "northerly or in front by the said river." This gives to Mrs. Flett only to the Miramichi river, and that would be all defendant's grantors could convey to him. There is no dispute that the wharf in question is outside the northern boundary specified in Helen Flett's deed, and that the title to said wharf is in the Crown. Under such circumstances, therefore, defendant by his deed takes nothing as far as this disputed property is concerned, and as between the parties to this action the dispute is reduced to a question of possession, from which standpoint it was treated by the learned Chief Justice in the Court below, who found, as a matter of fact, that from the giving of the Snowball deed in 1870, each successive grantee, down to and including plaintiff, went into possession of this wharf.

Inasmuch as the plaintiff—as well as his predecessors in title—went into actual physical possession of this disputed wharf, it is, I think, under the circumstances existing here, unnecessary to consider whether the words "in front of" would include the whole of a structure admittedly extending across the front of an adjoining property, or across a part thereof, and being an integral structure throughout. Upon that point it seems to me unnecessary to express any opinion, because it is found, as a fact, upon sufficient evidence, that plaintiff himself, as well as his predecessors in title, took actual possession, not only of the lands included in their respective deeds, but also of that part of the wharf fronting upon the adjoining property and claimed by defendant in this suit, and that plaintiff had such possession prior to any occupancy by defendant or by his predecessors in title. Having such possession, the plaintiff is entitled to the protection of the Court against an intruder. No one can dispossess him without shewing a better title, and this defendants have failed to do. The cases referred to by the learned Chief Justice, *viz.*, *Asher* v. *Whitlock* (1865), L.R. 1 Q.B. 1, and *Perry* v. *Clissold*, [1907] A.C. 73, are conclusive upon this point; see also Halsbury's Laws of England, vol. 24, p. 328.

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As to the question of damages, it has been found as a fact that the defendant's mill was the cause of the destruction of the house on plaintiff's land, and inasmuch as defendants' mill was wrongfully upon the land, I agree with the learned Chief Justice that it is not necessary for plaintiff to prove negligence on defendant's part in order to recover for damages caused by a fire originating from defendants' mill; and for myself I would have no hesitation in concluding from the evidence that the operation of defendants' mill was so fraught with danger, by reason of the escape of sparks from its chimney, that it was in itself a nuisance which plaintiff would have a right to abate. I think the damages assessed were very moderate in amount.

Grimmer, J.

GRIMMER, J.:—In this action the defendant moves that a decree of the learned Chief Justice sitting in Chancery be set aside, and that judgment or a decree be entered for the defendant, or failing this for a new trial.

It appears the plaintiff claims he is the owner of certain wharf property on the Miramichi river, in the county of Northumberland, upon which the defendant Sullivan had wrongfully placed a mill, which, by faulty construction and operation, set fire to and destroyed a building of plaintiff's on property adjoining the wharf, and he seeks possession of his wharf and damages for his loss.

The plaintiff, in August, 1910, purchased, at foreclosure sale from the Bank of Montreal, the Thomas W. Flett mill property, so called, and particularly described in the deed thereof. Thomas W. Flett obtained his title in 1887, when the property was sold at sheriff's sale, under execution against John Flett the owner, who had purchased it from Hon. J. B. Snowball in the year 1870.

Previous to 1870, John and William Flett operated a mill on the property, and built a wharf thereon, with a wing or addition in the deep water of the river, which is the real wharf property in dispute in this action.

The descriptions of the property in the several transfers are substantially the same, and in addition to conveying certain upland, also severally convey "the wharf and mills standing or being upon or in front of the said premises, and the steam engines and machinery of every description contained in the said mills or appertaining thereto," etc.

William Flett died intestate in 1867, and John Flett, as stated,

bought the property so operated upon, with the appurtenances as described in 1870.

William Flett owned land adjacent to above, and in 1893 his heirs conveyed their interest to their mother, Helen H. Flett.

In 1901 a partition was made between Helen H. Flett, widow of William, and said Thomas Flett, in view of an existing difference, but no reference was made in the deed to the disputed wharf property. Helen Flett died intestate in 1905, and in 1913 her heirs by deed conveyed to the defendant Sullivan the land so previously conveyed by them to her, upon which it is claimed the disputed wharf stands, the land so conveyed according to the deed, "extending northerly into the Miramichi river, as far as the said parties hereto of the first part own the same, or have any right thereto."

It appeared from the evidence, and the learned Chief Justice so found, that the title to the land upon which the wharf is built is in the Crown, and that it was not material to this suit whether, under a proper construction of the deed given by Mr. Snowball it passed to John Flett, as he, John Flett, was in possession of it and used it for the purposes of his mill when he purchased the property in 1870, and continued in possession until it was sold to Thomas W. Flett in 1887, who continued in possession until 1905, when he sold to the Thomas W. Flett Lumber Company, which went into possession and used the wharf in connection with the property until the transfer to the plaintiff, who from the time of his purchase has been in possession thereof.

In this view I entirely and fully concur, and I also agree with the learned Chief Justice that "the possession of the plaintiff and his predecessors in title is good against all the world save only the true owner, and he is entitled to hold the property against all the world, save that one who can shew a better title:" see *Perry* v. *Clissold*, [1907] A.C. 73; *Asher* v. *Whitlock* (1865), L.R. 1 Q.B. 1.

I also am of the opinion there was quite sufficient evidence to justify the finding of the learned Chief Justice on the question of damages.

This appeal must be dismissed with costs.

WHITE, J., agreed with MCKEOWN, J.

White, J.

*Appeal dismissed with costs.*

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## BUXTON v. LOWES.

*Alberta Supreme Court, Harvey, C.J., Scott, Stuart, and Beck, JJ. June 30, 1915.*

1. MASTER AND SERVANT (§ I E—21)—DISMISSAL—NOTICE—GENERAL DISMISSAL—MISCONDUCT.

The period of notice stipulated in a contract of employment or the proportionate remuneration in lieu thereof, in the event of a termination of the relationship upon a failure to carry out the duties in accordance with the contract, does not affect the master's right of dismissal without remuneration for any misconduct or a wilful breach of duty.

2. MASTER AND SERVANT (§ I E—25)—DISMISSAL—WHAT CONSTITUTES—REVOCATION OF POWER OF ATTORNEY—GROUNDS FOR QUITTING.

The revocation by a master of a power of attorney over bank funds given to his manager, and a disapproval of the latter's actions because of his disregard of the master's instructions, does not amount to a dismissal from service as to warrant the servant to quit the employment.

3. MASTER AND SERVANT (§ I E—22)—DISMISSAL—GROUNDS—DISOBEDIENCE OF INSTRUCTIONS—DISPOSITION OF BANK FUNDS.

A disregard by a manager of his master's instructions as to the disposition of bank funds, over which the manager has a power of attorney, amounts to a misconduct which will justify his dismissal by the master.

Statement

APPEAL from judgment dismissing action for wages.

*A. H. Clarke*, K.C., for appellant.

*R. B. Bennett*, K.C., for respondent.

Harvey, C.J.

HARVEY, C.J.:—The plaintiff, by his statement of claim, alleges that by agreement in writing he was employed

to open, conduct, manage and direct the business of the defendant in the capacity of the manager of the defendant's business as real estate agents and financial agents, and in the city of London, England, for a period of 5 years from April 1, 1911.

He further alleges that he performed his duties until May 8, 1914, "when the defendant wrongfully and without cause dismissed and discharged the plaintiff from his employment." He claims for the remainder of the term of 5 years at the rate of $10,000 a year, the agreed remuneration.

By the terms of the agreement the plaintiff and defendant were to divide the profits of the business equally, but if the plaintiff's share did not amount to sufficient to give him $10,000 a year he was to receive that sum. The profits never did amount to that sum, and the plaintiff paid himself, out of funds in his hands, £175 per month for eleven months and £157 for the twelfth month, to make up $10,000 for the year, during each year.

At the commencement of the business the plaintiff was given a general power of attorney, and a special one for the banking business, which was to be conducted in defendant's name. A second one for the latter purpose was given at the instance of the London bank where the account was kept. The salary and

other expenses were chiefly paid out of moneys received in England, when there were any proper entries being made by the defendant in the books of his business at Calgary, but, when there were none, money was sent from Calgary, and the defendant's bank in Calgary was instructed to authorize the bank in London to cash drafts made by the plaintiff for £300 monthly, which it did. On April 1, 1914, the defendant, being in want of more money for his Calgary business, cabled the plaintiff as follows:—

Telegraph immediately all of the money you have on deposit except $100.

Although the bank books appear to have been used on the examination of the plaintiff, they are not before us, but it appears from the plaintiff's evidence that at that time he had to the defendant's credit in the bank in two separate accounts something over £280. The next day he drew on Calgary for £300, and on the same day cabled to defendant as follows:—

Referring to your telegram of the 1st, have no surplus funds.

The account had in fact over £580, or that much less £175, which he had paid himself for his April salary either on the 1st or 2nd. He explains that there was a tacit understanding between him and the bank that a balance of several hundred pounds should be retained in the account.

Following the cable on the same day, he wrote defendant confirming the cable, and adding:—

We may say that we cannot understand your sending such a message. You surely do not imagine that we can keep this office open with only $100 in the bank, especially after the trouble we experienced in getting money from your end when we first opened. As a matter of fact, the Bank of Scotland has several times hinted that the balance kept with them is entirely too small. We are keeping expenses down to a very low ebb until conditions in Canada bring about a change for the better.

On the same day defendant sent the following cable:—

Not referring to surplus, telegraph immediately all money on hand,

to which plaintiff replied by cable on April 3rd:—

Have barely sufficient meet current expenses, impossible transfer. Try get outstanding indebtedness paid soon. Have written.

On April 29 the London bank advised the Calgary bank, at its request, that the balance on hand was over £580, and on April 30 defendant drew on the London office for £450, and advised the London bank asking them to hold funds to meet draft. The reply from the London bank was not received till May 4, and it stated that they could not hold funds, as a cheque for £175 had been presented and paid.

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This was, no doubt, a cheque for plaintiff's May salary. The Calgary bank on May 6 cabled to hold balance and advise amount, to which a reply was received on May 7, stating that the balance was £2 9s. 9d. What had happened had been that when the London bank received the advice that a draft for £450 had been made they had notified the plaintiff, who therefore transferred all of the balance, except the small amount mentioned, to another bank in his own name, and on May 5, having done so, he cabled to defendant as follows:—

What is meaning your draft Bank of Scotland? Do not propose to be stranded here with no funds to pay creditors. Cable reply.

which he followed by a letter confirming it and stating:—

In explanation of the above, I was surprised at receiving advice from the Bank of Scotland yesterday to the effect that you had drawn on the firm's account for £450, they having received a cable from the Quebec Bank to hold funds for that amount. The manager of the bank immediately communicated with me asking for an explanation, which, of course, I was unable to give him, so he has cabled the Quebec Bank to the effect that there are not sufficient funds to meet the draft, so I presume it will not go forward. It is hard for me to understand your action in this matter, although it looks very much as if something underhanded were going on; so, in order to safeguard, as far as possible, myself, the employees, and creditors of this office, I have withdrawn the balance at the credit of our two accounts at the Bank of Scotland, namely, £121 2s. 7d. in the No. 1 account, and £263 2s. 8d. in the No. 2 account, and have deposited £384 5s. 3d. in the National Provincial Bank in the name of G. S. Buxton, manager's account, where my signature only will be accepted on cheques, until such time as I receive advice from you of just what the meaning of your action is. We have accordingly debited your collection account, and credited your general account with £263 2s. 8d., being the amount of money transferred from our No. 2 account.

I very much regret that it has become necessary to do this, but your actions lately, first in cabling on the 1st of April to transfer all our funds with the exception of $100, and now in drawing against all the funds at our credit, including the £300 draft put through on the 1st ultimo for current expenses, are most disconcerting, especially as I am entirely in the dark as to your real meaning.

Surely the time has come for you to be candid with me. That you are thoroughly disgusted at not getting any business from this end I take for granted, but you cannot be more so than I am myself. The facts to face are that the business here is dead, at least for the time being, but in the meantime expenses will have to be met.

I cannot think that you would be misguided enough to attempt to get out of your contract, but I must say your actions look very much like it. If so, the sooner you tell the truth about your intentions, instead of trying to force my hand in an underhand way, the better; then I shall know what action to take, for as matters stand now it is very unsatisfactory for all concerned.

On the same day plaintiff made the monthly draft for £300, which was subsequently paid to defendant's account. On receipt of plaintiff's cablegram of May 5, defendant cabled on the following day as follows:—

I am running the business, you are not. If I want your advice will ask you. Your drafts fully cover your expenses. Want you reduce your staff as quickly as possible.

And in receipt of advice from the Calgary Bank that the money had been withdrawn from the account in the London Bank, cabled to the London Bank cancelling the power of attorney, and defendant, on May 8, sent the following cablegram to the plaintiff:—

Your action altogether unsatisfactory. Have cancelled power of attorney.

to which on the same day plaintiff notified by cablegram:—

Fail to understand your action. Pending explanation I reserve all rights.

The plaintiff had already notified to the cablegram of May 5 by letter dated May 6, in the following terms:—

Your phraseology might have been chosen more happily. *It is, I consider, most insulting, but perhaps you do not know any better.* The message does not answer my cable of the 5th, however. My letter which went forward yesterday confirming the cable is perfectly plain, and calls for a candid reply, which I require without any more beating about the bush. Reverting to your cable, I may say that you may be running the business, *but please remember that you are not running me.* The staff of this office is already reduced to its lowest possible proportion.

Plaintiff's cablegram of May 8 was acknowledged by letter of the same date from defendant's manager in Calgary, stating that defendant had left for the east and was not expected back before June 1. On June 2 plaintiff sent to defendant this further cablegram:—

Unless power of attorney restored immediately and bank authorised to accept expense drafts monthly until existing contract expires, shall take legal action. Cable reply.

which he confirmed by letter of same date, and on June 13 he wrote this further letter:—

As to your action in cancelling my power of attorney, you have forced me to close this office. I beg to inform you that the books, bank books, filed receipts, etc., have been deposited to your order with the Pall Mall Depositing and Forwarding Co. Ltd., St. Albans Place, London W., whose receipt I enclose herewith. The furniture and fittings, inventory of which accompanies this letter, remain on these premises.

Plaintiff then, without having received any further communication from defendant, proceeded to Canada, and reached Winnipeg, where he consulted solicitors, who wrote a letter to defendant threatening action unless a settlement for breach of

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agreement was made before the 11th. The action was, in fact, begun by Calgary solicitors on July 17, 1914.

The defence denies a wrongful dismissal or any dismissal, and in a counterclaim for damages sets up that the plaintiff left defendant's employment. The action was dismissed by the trial Judge, who took the view that what had taken place did not amount to a dismissal, and that the plaintiff had in fact abandoned his employment. While I think there is much in the circumstances to warrant the conclusion that the defendant did not intend to dismiss the plaintiff when he cancelled the power of attorney, I do not find it necessary to determine whether the plaintiff did in fact treat it as a dismissal or whether he would be justified in so doing, because it appears to me that if the defendant did dismiss the plaintiff—and the latter's action is based entirely upon such a dismissal—then the defendant was entirely justified in such dismissal and the plaintiff has no cause of action. In my opinion, to hold that the conduct of the plaintiff was justified and that the defendant could not rightfully dismiss him for such conduct would be entirely subversive of the rights of a master over his servant. It would be to say that the servant and not the master shall have control over the conduct of the master's business. The fact that the plaintiff was a highly-paid employee, occupying a position of trust, while it might entitle him to consider that he could reasonably expect some confidence from his employer, would not justify him in a failure of that duty of obedience which every servant owes to his master, or entitle him to use insolent and insulting language to his master, to say nothing of his depriving the master of the control over his own property for the express purpose of preventing the master from having the use of it.

The fact that the defence is not in terms that of justification of the dismissal does not appear to me to be of any particular importance on the facts of this case. There is no reason why the defence should not be amended to set that up, because the purpose of pleading is not to prevent but rather to permit the rights of the parties to be determined upon the true facts, and the plaintiff can be in no way prejudiced by the want of notice of such defence, since all the facts are fully disclosed by the evidence, and there is no reason for a suggestion that there could be any answer to such a defence which is not shewn by the evidence. There is a clause

in the agreement which provides that in the event of the manager failing to carefully and faithfully carry on the business in accordance with the contract "the defendant shall have the right to cancel the agreement by giving three months' notice or paying three months' remuneration at $10,000 a year, and giving the same right of cancellation to the plaintiff on giving three months' notice."

It is not contended, and I think rightly, that this provision restricts the right of the defendant to dismiss for misconduct. It is a reciprocal right given to each party to the agreement to determine it upon the same conditions, and is quite distinct from the right which exists in the master alone, by reason of the relationship of master and servant, to dismiss for proper cause. I would dismiss the appeal with costs.

Scott, J.
Stuart, J.

SCOTT and STUART, JJ., concurred with HARVEY, C.J.

Beck, J.

BECK, J.:—I am inclined to agree with the opinion expressed by the Chief Justice; but there is another ground, upon which, at the conclusion of the argument, I thought and still think is a complete answer to the plaintiff's entire claim. The agreement between the plaintiff and defendant contains the following clause:

> 17. In the event of the manager failing to carefully and faithfully carry on the business of the company, in accordance with this contract, the company shall have the right of cancelling same upon giving the manager three months' notice in writing to that effect, or, in lieu of such notice, by paying the manager three months' remuneration on the basis of $10,000 a year.

In my opinion this clause cannot be taken to have been intended to take away the defendant's right to dismiss the plaintiff without remuneration for wilful breach of his duties, and therefore must be taken to have been intended to meet the case of undeliberate breaches of duty, *e.g.*, through misunderstanding, want of care or errors of judgment.

What is set forth by the Chief Justice is, I think, at least sufficient to establish breaches of duty on the part of the plaintiff of this latter character, and therefore to entitle the defendant to apply the provisions of the clause in the agreement which I have quoted, even though it be assumed that they are not of such a character as to justify dismissal without remuneration.

A calculation of the amount received by the plaintiff from the commencement up to a period 3 months from May 8, 1914—at which date I think it must be taken the plaintiff was discharged—

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shews that he received his full salary plus the additional 3 months' salary called for by the clause in question.

In this view the plaintiff is not entitled to recover anything. It is true that the defendant denies that he dismissed the plaintiff on that date, or indeed at any time, or that he intended to do so. But his telegram of that date was ambiguous, and so expressed as, in my opinion, to justify the plaintiff in so understanding it; and though he did not at once make up his mind that such was its meaning and intention, he eventually did so, as he was, in my opinion, entitled to do, and in his statement of claim he bases his claim on this position.

For these reasons I think that the plaintiff cannot succeed, and that his action and the appeal must be dismissed with costs.

*Appeal dismissed.*

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## YOUNG v. BANK OF NOVA SCOTIA.

*Ontario Supreme Court, Appellate Division, Falconbridge, C.J.K.B., Hodgins, J.A., Riddell and Latchford, JJ. June 15, 1915.*

1. LANDLORD AND TENANT (§ II C—21)—YEARLY TENANCY—HOLDING OVER—EFFECT—CORPORATION TENANT.

Where a tenant for years under a valid lease continues in possession after the expiration of the term, and pays the monthly rent reserved in the lease, a tenancy from year to year is thereby established, notwithstanding the fact that the tenant happens to be a corporation. [*Finlay* v. *Bristol & Exeter R. Co.* (1852), 7 Ex. 409; *Garland Mfg. Co.* v. *Northumberland Paper, etc., Co.*, 31 O.R. 40, distinguished; *Doe dem. Pennington* v. *Taniere* (1848), 12 Q.B. 998, followed.]

Statement

APPEAL by the defendants from the judgment of the District Court.

The following statement of the facts is taken from the judgment of RIDDELL, J.:—

The facts, as I understand them, are few and simple. By an indenture made under seal, the plaintiff leased to the defendants, a chartered bank, certain premises in Fort William, for a term of 18 months from the 1st September, 1912, at a rental "yearly and for every year during the said term . . . of $2,700 . . . payable . . . in even portions monthly of . . . $225 . . . each; the first of such payments to . . . be made on the first day of October, . . . 1912." The tenants entered into possession and remained in occupation during the term; before the termination of the lease, a number of conversations, which might perhaps be called negotiations, took

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place between the plaintiff and the agent of the defendants, but no arrangement was arrived at.

When the term was up on the 1st March, 1914, the defendants, having paid rent according to the lease, continued on in possession, and on the 5th March, another conversation took place, but with no definite result. The defendants paid, expressly as rent, the sum of $225 on the following dates in 1914, March 31, April 30, June 30, July 31, August 31, September 30, October 31, and November 28. Cheques are produced for these payments, marked "rent"—the May cheque is not produced, but there is no dispute that the rent was paid in that month also. The defendants having obtained other premises, and claiming to be "a monthly tenant," on the 20th October, 1914, served notice of delivering up possession, and went out of possession on or before the end of November. If the tenancy was "a monthly tenancy," it is admitted that the notice is sufficient; but the plaintiff contends that the tenancy was from year to year.

The action was launched on the 13th January, 1915, and is for $225, the rent claimed to be due on the 1st January, 1915; the defendants in their pleadings claim a specific agreement for a monthly tenancy, and that during this "monthly tenancy, lasting from the 28th day of February, 1914, to the 1st day of December, 1914," the heating was insufficient, etc.

At the trial before His Honour Judge O'Leary, the defendants failed to establish the alleged agreement for a monthly tenancy, and also any defence on the heating, etc. His Honour held that a tenancy from year to year was created; that, accordingly, the notice of giving up possession was insufficient; and that the plaintiff was entitled to recover.

*C. A. Masten*, K.C., for appellants.

*Thomson, Tilley & Johnston*, for plaintiff, respondent.

The judgment of the Court was delivered by

Riddell, J.

RIDDELL, J.:—Upon the argument before us there were two main contentions which now fall to be considered.

The first can be disposed of without difficulty—it is contended that, under the facts, no implication of tenancy from year to year could arise, even if the tenant were not a corporation.

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Riddell, J.

"Where a tenant for a term of years holds over after the expiration of his lease, he becomes a tenant on sufferance; but when he pays, or expressessly agrees to pay, any subsequent rent at the previous rate, a new tenancy from year to year is thereby created upon the same terms and conditions as those contained in the expired lease, so far as the same are applicable to and not inconsistent with a yearly tenancy:" Woodfall on Landlord & Tenant, 19th ed., p. 257; *Bishop* v. *Howard* (1823), 2 B. & C. 100; *Hyatt* v. *Griffiths* (1851), 17 Q.B. 505. But it is said, "This . . . appears to be matter of evidence rather than of law:" Woodfall, same page; *Thetford (Mayor of)* v. *Tyler* (1845), 8 Q.B. 95; *Idington* v. *Douglas* (1903), 6 O.L.R. 266; *St. George Mansions* v. *King* (1910), 1 O.W.N. 501, 15 O.W.R. 427 (a decision of a Divisional Court of the High Court); *Roe dem. Brune* v. *Prideaux* (1808), 10 East 158 (this case is wrongly cited as in "10 Exch.," 6 O.L.R., last line of p. 266.)

This is perfectly true, but, as was said in the last cited case, at p. 187, by Lord Ellenborough: "The receipt of rent is evidence to be left to a jury that a tenancy was subsisting . . . ; and if no other tenancy appear, the presumption is that that tenancy was from year to year." Here no other tenancy was made to appear, and the presumption is not met.

The defendant then sets up that, even if under such circumstances a private individual would be held liable as tenant from year to year, a corporation cannot be—and cannot be because it is a corporation. Every corporation must judge for itself whether it should set up such a defence, and whether it should avail itself of a technical rule of law to obtain an advantage over an individual which another individual or a firm could not. But, however such a defence may be characterised, this bank is entitled to the full benefit of any rule of law available to it: and, as the defence is insisted upon, it must be considered and given full effect to.

The cases relied upon are *Finlay* v. *Bristol and Exeter R.W. Co.* (1852), 7 Ex. 409, and our own case of *Garland Manufacturing Co.* v. *Northumberland Paper and Electric Co. Limited* (1899), 31 O.R. 40.

In each case the company had been in possession for a year

without a lease under seal, but under an agreement by parol, and held over afterwards for a time, paying rent at the former rate. This was considered not to make them tenants from year to year, and they were held liable for use and occupation only, and only for the term they actually occupied.

A consideration of the principles of the common law enables us to understand the full effect of such decisions. One in possession of lands of another may be in such possession (1) under a lease, written or oral, express or implied—the feudal relation of landlord and tenant exists, the tenant must pay rent—or he may be in such possession (2) without a lease—the relationship of landlord and tenant does not exist, there is no rent payable as such, but the law implies a contract to pay the landlord a reasonable sum for the use and occupation of his land.

Accordingly, when the common law was in all its glory, if a landlord sued in assumpsit for use and occupation, and it turned out that there was a lease, he was nonsuited—his action should have been in debt, or, if lease was under seal, in covenant, not assumpsit. The plaintiffs in *Reade* v. *Johnson* (1591), Cro. Eliz. 242, and *Clerk* v. *Palady* (1598), Cro. Eliz. 859 (not 809, as cited in Woodfall, p. 630), were victims to this error, with many other landlords. To aid the landlord, a statute was passed to get rid of this difficulty—one of the very many statutes to assist land-owners—few will be found till the other day to assist the poor man—but *beati possidentes*, and to him that hath shall be given.

This statute (1738), 11 Geo. II. ch. 19, by sec. 14, provided that, if an action were brought for use and occupation, the proof of a demise at the trial should not nonsuit the plaintiff, unless the demise should be by deed. Thereafter the prudent landlord, who had no lease under seal, always sued in assumpsit—if no demise appeared at the trial, he recovered for use and occupation—if a demise were proved, he recovered the amount of rent reserved, that being used to fix the quantum of damages: *Beverley* v. *Lincoln Gas Light and Coke Co.* (1837), 6 A. & E. 829, at p. 839, note and cases cited therein; *Churchward* v. *Ford* (1857), 2 H. & N. 446 (not 7 H. & N., as Woodfall has it, p. 630, note (*c*)), *per* Bramwell, B., at p. 449.

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Accordingly, the plaintiff in *Finlay* v. *Bristol and Exeter R.W. Co.*, 7 Ex. 409, brought his action in assumpsit for use and occupation. Of course he could not recover for use and occupation (proper), because the defendants did not use or occupy. He must then prove a demise. That he could not do—the defendants had never been tenants in the strict sense of that word—the relation of landlord and tenant never existed—during the first year the occupation was under an invalid agreement, not "a contract valid in law" (p. 413); when they held over for the following year, there was no change in the relation—the mere payment of money for the use of land does not itself create the relation of landlord and tenant. When then and how was this relationship established? There could be no satisfactory answer to this question, and the plaintiff failed: "no fresh interest was created at the expiration of the second year" (p. 417).

So in *Garland* v. *Northumberland Paper and Electric Co. Limited*, 31 O.R. 40, the defendant company occupied the premises under a verbal agreement for one year, paying rent—this did not create the relationship of landlord and tenant, and under the old practice an action would not lie for "rent," i.e., in debt, but the action would have been for damages in assumpsit for use and occupation. The defendants by overholding and paying rent did not create the feudal relationship; and thereafter, as before, use and occupation was the appropriate and only form of action. Clearly this did not lie.

Our case is quite different—the relationship of landlord and tenant did exist because a valid lease was entered into and possession taken under it. How did this vanish? After the termination of the lease, the parties both considered that they were landlord and tenant—the plaintiff that the tenancy was from year to year, the defendants apparently that it was monthly: but both intended and believed that the relationship existed—and, so far as I can see, it did. If so, *cadit quæstio*.

The case of *Doe dem. Pennington* v. *Taniere* (1848), 12 Q.B. 998, seems to be in point. There the Dean and Chapter of Canterbury were empowered by statute to grant leases for 99 years, provided that in each case there should be a covenant by the lessee to build. They leased to P. in 1778, without such

covenant; the rent reserved was punctually paid in the time of the original Dean and several successors. Ejectment was brought, and the invalidity of the original lease set up. The Court of Queen's Bench—a very strong Court composed of Denman, C.J., Patteson, Coleridge, and Wightman, JJ.—held that, even if the lease were void, the "receipt and distribution (of the rent) were evidence from which, without proof of any instrument under seal, a demise from year to year might be presumed against them (i.e., the Dean and Chapter); the presumption in such a case being the same against a corporation aggregate as against an ordinary person." Lord Denman, C.J., giving the judgment of the Court, says at p. 1013: "The presumption arising from such payment and acceptance is the same in the case of a corporation as of other persons."

If a presumption is the same against a landlord corporation as against other persons, I am unable to understand how it is not the same against a tenant corporation.

Whether *Finlay* v. *Bristol and Exeter R.W. Co.* is well decided, we need not consider—Sir Frederick Pollock thinks it is no longer of authority: Pollock on Contracts, 8th ed., p. 157, note (*i*), and p. 163; see also note (3) in 86 R.R. 704, by J. G. Pease, referring to *South of Ireland Colliery Co.* v. *Waddle* (1868-9), L.R. 3 C.P. 463, L.R. 4 C.P. 617. If the *Finlay* case falls, the case in 31 O.R. falls with it. (In a case in this Divisional Court an opinion was expressed that *Garland* v. *Northumberland Paper and Electric Co. Limited* could not be supported: it was not however necessary to give judgment on this point, as the case went off on other grounds).

The present case is quite distinguishable from those relied on, for the reasons already given.

I think that, a valid tenancy actually existing, the consequences of overholding and paying rent are the same for a corporation-tenant as any other.

*Appeal dismissed with costs.*

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## GREIG v. FRANCO-CANADIAN MORTGAGE CO.

*Alberta Supreme Court, Hyndman, J. September 10, 1915.*

1. VENDOR AND PURCHASER (§ I C—16)—DEFECTIVE TITLE—OUTSTANDING COAL LEASE—APPROVAL OF PURCHASER'S SOLICITOR—RIGHT OF REPUDIATION.

A purchaser is not entitled to repudiate the contract or to a return of the purchase money by reason of an outstanding lease against the coal minerals of the land, where the purchaser's agent, who acted as his solicitor, had knowledge at the time of the purchase that the vendor was not the registered owner of the minerals, and that the sale was intended as that of the surface land only.

2. EVIDENCE (§ VI H—562)—PAROL EVIDENCE—RESERVATION OF MINERAL RIGHTS—MISTAKE—INTENTION—ADMISSIBILITY.

The real intention of parties, or a mistake as to a reservation of mineral rights in a written agreement for the sale of land, may be shewn by parol evidence in the same action for specific performance of the contract so varied, and this even where the Statute of Frauds is pleaded.

3. LAND TITLES (§ III—30)—COAL LEASE—IMPROPER REGISTRATION—REGISTERED OWNER—SETTING ASIDE.

The registrar has no right under the Land Titles Act (Alta.) to register a mineral lease where the lessor does not appear to be the registered owner, and if so registered, it may be set aside by anyone whose interest in the property is affected.

Statement

ACTION for return of purchase money in a sale of land.

*O. M. Biggar*, K.C., and *S. B. Woods*, K.C., for plaintiffs.

*C. C. McCaul*, K.C., and *J. E. Wallbridge*, K.C., for defendants.

Hyndman, J.

HYNDMAN, J.:—The plaintiffs reside in the British Isles and the defendant is a Provincial Joint Stock Co., with head office at the City of Edmonton.

On October 22, 1912, the plaintiffs and defendant company executed an agreement in writing whereby the defendants agreed to sell and the plaintiffs agreed to purchase the south east quarter of section 28, township 53, range 25, west of the fourth meridian, in the Province of Alberta, containing 160 acres, more or less, the purchase price being $68,000, payable as follows: $20,000 upon the execution of the agreement, $16,000 on October 22, 1913, $16,000 on October 22, 1914, and $16,000 on October 22, 1915, together with interest at the rate of 7 per cent. per annum upon so much of the said purchase price as from time to time remained unpaid. The agreement contained a covenant on the part of the defendants whereby, upon payment by the plaintiffs of the said sums of money and interest, to immediately convey or assure or cause to be conveyed or assured to the plaintiffs by a good and sufficient transfer under the Land Titles

Act and amendments thereto, all the said land, together with the appurtenances, but subject to the conditions and *reservations expressed in the original grant thereof from the Crown*, such transfer to be prepared at the expense of the purchasers, and to be free and clear of all liens, charges, mortgages and encumbrances excepting such as shall have been made or suffered by the said purchaser, and that the defendant should produce at the Land Titles office of the Northern Alberta Land Registration District and deposit therein a certificate of ownership of the said land in their own favour free and clear as aforesaid, so that the said purchasers could, upon registering the transfer aforesaid, obtain a certificate of ownership for the said land in their own favour free and clear as aforesaid.

The only reservations in the grant from the Crown were (*a*) the use of navigable waters, (*b*) the rights of fishing on or adjacent to the lands in question, (*c*) the rights of landing and mooring boats upon the said lands. There was no reservation of coal, mines or minerals, which consequently passed with the grant.

The plaintiffs paid the defendant the down payment of $20,000 and interest on the balance amounting to $3,360, and also the instalment of $16,000 which fell due on October 22, 1913, as well as taxes amounting to $52.36.

The plaintiffs now allege that the defendant is not and never has been the owner of the land in question, and is not and never has been in a position to make title thereto, nor to transfer or cause to be transferred the land to the plaintiffs free and clear of all encumbrances except such as have been made or suffered by the plaintiffs, nor are they in a position to insist upon the encumbrances upon the said lands being discharged and are not and never have been in a position to produce or cause to be produced and deposited a certificate of ownership of the lands in their own name free and clear as aforesaid nor to put the plaintiffs in a position to obtain such certificate of ownership upon the payment of the purchase price and interest.

The plaintiffs further allege that on or about *October* 21, 1914, *they became aware of the last mentioned facts and that they forthwith repudiated the agreement or contract sued on,*

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and that they demanded return of the moneys paid by them thereon as well as damages for breach of contract, and claim: (1) a declaration that the agreement is rescinded; (2) repayment of the moneys paid thereon; (3) interest at the rate of 6 per cent. per annum on the moneys paid; (4) damages for breach of contract $30,000; (5) costs of the action; (6) in default of payment, enforcement of a lien upon the estate of the defendant in the said lands.

The principal objection on the part of the plaintiffs is that, first, the defendants are not the owners of or entitled to call for title to the coal, mines and minerals in and under the lands in question, and that there is outstanding against the coal rights a lease for a term of 100 years from September 23, 1910, granted by Raymond Brutinel to the St. Albert Collieries, Ltd., which, in addition to the right to work the mines and minerals, contains a provision to the effect that the lessee may on certain conditions be permitted to purchase whatever area of surface rights thereof the parties hereto, or in the event of dispute, arbitrators shall consider necessary for the economical working of the coal, mines and rights granted under the lease and other terms of the said lease which affect the rights of ownership of the surface and which, if the lease subsists and was in existence without the knowledge of the plaintiffs at the time of purchase, would, in my opinion, be a defect in title such as to justify the plaintiffs in repudiating the contract.

The facts with regard to the title are as follows: The grant from the Crown was made on June 23, 1894, to one Narcisse Anetil dit St. Jean, covering the lands in question with the reservations hereinbefore mentioned. On September 21, 1910, the said lands became vested in Raymond Brutinel of Edmonton, capitalist, as owner in fee simple, there being no reservations except the statutory ones. This ownership, therefore, included the coal and mineral rights. On October 12, 1910, said Brutinel transferred all his interest in the said land to the St. Albert Development Co. Ltd., the descriptive part of the said transfer being as follows: The south east quarter of section 28 in township 53 in range 25 west of the fourth meridian, but subject to "a certain outstanding lease of the coal and coal mining rights

under the said lands made by the transferor to the St. Albert Collieries, Ltd." Upon this transfer on October 14, 1910, a certificate of title was duly issued in the name of the St. Albert Development Co. Ltd., covering the lands in question, the description reading as follows:—

The south east quarter of section 28, of township 53, range 25, west of the fourth meridian, in the Province of Alberta, Dominion of Canada, containing 160 acres more or less.

No mention is made on this certificate of the lease to the St. Albert Collieries, until October 21, 1910, when a lease in statutory form from Brutinel to St. Albert Collieries, Ltd., dated September 23, 1910, was registered. I will refer to the question of this lease and the propriety or impropriety of the registration of same later on.

At the time, therefore, of the argument sued on, the lands were in fact registered in the name of the St. Albert Development Co. Ltd., subject to said lease for 100 years. On September 28, 1912, however, Brutinel, acting for the St. Albert Development Co., entered into an agreement by way of option to Leon Bureau and George Barbey, whereby he agreed to give them an option irrevocable up to but not after November 28, 1912, to purchase the lands in question and other lands for the sum of $139,810, of which $33,000 was to be paid in cash on the acceptance of the option, and the balance on the terms in the draft agreement annexed thereto, and there was annexed to the option the form of agreement which was to be executed by the parties in case of the acceptance. In November following, the option was accepted and the agreement was later signed by all the parties. The description of the land in both the option and the agreement contained the following reservation, viz.: "*reserving thereout and therefrom all coal and minerals and the right to work the same.*" As above mentioned, the land, including the coal, was vested in the St. Albert Development Co. Ltd., subject to said lease.

The agent acting on behalf of the plaintiffs throughout all the negotiations for purchase was one R. W. Cassells, a solicitor, at that time practising in Edmonton, the plaintiffs, as a matter of fact, up to that time never having been in Edmonton, and leaving everything in connection with their transactions entirely

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to their agent Cassells. The plaintiffs personally know nothing of what happened at the various meetings between Cassells and the real vendors Barbey, Bureau and Kimpe, prior to the signing of the agreement. Cassells since left the province and was not available to either party as a witness at the trial. The defendant company, as a matter of fact, has no beneficial interest in the land, but was named as vendor merely as trustee for Bureau, Barbey and Kimpe for convenience who signed a document, ex. 58, ratifying the agreement made by the defendant.

So far as the title being in the name of the St. Albert Development Co. Ltd., is concerned, there cannot be any objection, for in the agreement sued on it is expressly mentioned that the title stands in the register in that company's name, the agreement having been drawn by Cassells himself, and I am also satisfied Cassells knew of the reason why the defendant company was named as vendor—Kimpe's evidence is clear on the point that this feature was fully discussed.

The defendants set up in their defence, amongst other defences, that the written agreement of sale does not exhibit the true agreement betwen the parties, but by mistake common to both the reservation or exception of all coal and minerals and the right to work the same were omitted from the written document, the intention of all parties being that the agreement should be subject to such reservation or exception and that the plaintiffs were purchasing the surface rights only. They also contend that the plaintiffs have accepted and have waived all defects in defendant's title, if any. As above stated, in my opinion, the plaintiffs are bound by the acts and knowledge of their agent Cassells.

After a careful perusal of the authorities I have come to the conclusion that parol evidence to shew what was the real intention and agreement between the parties is admissible, and also that the defendant may prove mistake in the written agreement by parol evidence and in the same action obtain specific performance of the contract so varied, and this even where the Statute of Frauds is pleaded.

Bureau, one of the vendors, was at the date of the trial, according to Mr. Wallbridge, serving in the army in France, and

it was contended by defendant's solicitors that he (Bureau) was a necessary and most important witness on behalf of the defendant, and counsel strenuously urged that an adjournment be granted in order to procure his attendance or evidence. I did not feel disposed to grant an adjournment as I felt that no sufficient endeavour had been made by the defendant to either have him here or have his evidence taken on commission. The most important witness, therefore, so far as what actually took place at and prior to the completion of the transaction is Maurice Kimpe, one of the vendors. Certain reasons were urged why I should not place any weight on his testimony, but, after careful consideration, I do not see why I should not give it due respect. The fact that the witness Barry failed to mention Kimpe's name in his account of the negotiations is not surprising when the whole of Barry's evidence is considered. I do not think he was at all accurately informed of what was going on between Cassells and the other parties. He was not present at the conversations except to occasionally go into the room to ask or answer questions or receive instructions, etc. What he knew or what he did not know would seem to me to have little or no bearing on the case. In the absence, therefore, of Cassells and Bureau I am thrown on the testimony of Kimpe, as follows:—

Q. Did you have any conversation with Mr. Cassells respecting the mines and minerals? A. Yes.

Q. Tell us what that conversation was? A. The conversation started referring to mines and minerals, started this way, when he saw the agreement between Barbey, Bureau and Brutinel the conversation went on to Brutinel of the St. Albert Collieries, Mr. Bissett who had been in the country a long time and knew Brutinel personally referred to the money Brutinel had made out of all these deals, that he had bought land a long time ago for a nominal sum and sold the coal rights to a big concern at Montreal, who started a mine at St. Albert, and kept the surface which he was selling to us then for perhaps three or four times the amount he was paying for the whole thing, and from that we went on to talk about minerals, and Cassells asked if there was any danger of operating the coal under this quarter section, well we said those people have bought thousands and thousands of coal rights here that they will never operate, it is simply to keep a competitive mine out of the way; he said there is no possibility with the quality of coal they are getting out here, that they would mine under this quarter section; it was simply to keep competitors out of the field you see, and in view of the big expense they were put to to sink their first shaft at St. Albert there was no doubt they would endeavour to sink

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another one in that country; it costs $4,000 or $5,000, and after they got down 300 ft. they could not sell it or even sell the shale, and that is where the St. Albert Development Co. was mentioned. The exact wording of all this conversation I haven't got, but I know we talked about the coal rights extensively.

Q. Do you remember what meeting that took place at? A. I think that was at the first meeting and at the other meeting when Bureau was there they discussed what could be done with the land you see. The suggestion was made that the coal mine, if they were going to go ahead after spending all that money they would have to employ from 1,000 to 1,500 men to simply pay the interest on their bond, and the opening up of a market with 1,000 men it would mean 4,000 people there, and he thought that this would be a very handy place to have market gardening, because the land was suitable. On the other quarter section there was a brickyard employing from 250 to 300 men.

Q. Any conversation with Cassells regarding the state of the registered title? A. He evidently searched that title.

Q. What did he say about searching it, if anything? A. He said that there was no trace of that C.N.R. right of way on the title, although it was shewn on that map. He said he saw it on the map and the same map was in my office and he brought it to my attention which I haven't noticed before, and I told him it was very true that the C.N.R. would not have taken the right of way because it was simply cutting a short corner you see on the map.

This evidence is uncontradicted, and as there is nothing in his testimony which should induce me to discredit it I must conclude that Cassells knew at the time of the agreement the mineral rights were not owned by or under the control of the defendant's principals, and that plaintiffs were not purchasing same. To further strengthen this conclusion, the evidence is to the effect that Cassells was handed a copy of the option and attached unsigned agreement from Brutinel to Bureau and Barbey, ex. 24, which, as above stated, expressly reserves the coal and minerals and the right to work same, and in Cassells' file of documents which was handed Mr. Woods after Cassells left Edmonton in 1913, a copy of this option and agreement was found shewing conclusively, to my mind, that he knew or should have known of those reservations before the 1913 payment was made, although it would appear that this particular copy could not have come into Cassells' possession until after the acceptance of the option, as the agreement was not actually signed until December, 1912.

The manifest errors in the caveat filed by Cassells were, in

my opinion, due more to carelessness or confusion than anything else, but confirm my belief that he must have searched the title and seen the documents referred to by the witnesses for the defence and therefore must or should have known all particulars.

Mr. Woods also examined and perused the documents of title of defendants in the defendant's office before paying over the 1913 instalment and must have been aware of the state of the title at that time and must have been satisfied with the position of things otherwise I do not think he would have paid over so substantial a sum of money.

With regard to the lease to the St. Albert Collieries, Ltd., as above mentioned the same was registered after the title had been transferred to the St. Albert Development Co. Ltd., and under the Land Titles Act I would think that the registrar had no right to register same, the lessor therein named being Raymond Brutinel and not the registered owner. Such lease, in my opinion, was improperly registered and might be set aside by anyone whose interest in the property would be unduly interfered with. I am satisfied that if Cassells searched the title, which I believe he did before he reported to his principals, he was aware of its existence, as a memo. of it was recorded on the certificate of title. In his letter to Mr. Thirlaway of October 22, ex. 44, on the 4th page, he says:—

> The title is perfectly in order and I have filed a caveat on Mr. Greig's and your behalf in the usual way.

On p. 6 he says:—

> My half fee in this case will be $75, for I have had a great deal of work in connection with straightening out the question of the C.N.R. right of way, both at the Land Titles office and with the solicitors, both for the railway and for the vendors, and a large sum of money is involved. My disbursements, including cables, Land Titles fees for searches, and for filing the caveat amount to $36.07.

But on January 17, 1914, the fee simple of the coal rights was transferred to the Canadian Coal and Coke Co. Ltd., already the assignees of the lease to St. Albert Collieries Ltd. and the certificate of title for the leasehold interest was delivered up and cancelled. Counsel for the defendant contended that this operated as a cancellation and merger of the lease in every respect unless it was the intention of the company to keep alive its rights as set forth therein, which intention should have been

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expressed by taking title subject to same and remaining of record in the Land Titles office or by means of some other method. On the facts I am of opinion that a merger did take effect. If the lease itself disappeared, the conditions and rights remaining with it disappeared also, and the memo. of same on the title should be removed. In my opinion, this defect being removed, I do not think it is competent to the plaintiffs to repudiate the contract on this ground thereafter. The position of the matter, therefore, is shortly as follows. that at the time of the purchase the defendant company was not the registered owner of the coal rights and had no right to call for title to same, which the plaintiffs' agent, in my opinion, well knew, and that it was not intended that such coal right should be included in the purchase. But that in any event in view of the knowledge and acts of the plaintiffs they cannot at this stage repudiate, but must await the time for final completion of the contract. Repudiation must be made promptly after discovery of the defects in title and the plaintiff loses such right after he has done some act shewing an intention to affirm having knowledge of such deficiencies.

The plaintiffs, therefore, in my opinion, must fail in the action because if competent to repudiate such repudiation was too late, and because the real agreement between the parties did not include the coal rights and the lease referred to does not, as a matter of fact, exist, the same having been merged into fee simple, and the memorandum thereof should be removed from the register on proper application being made therefor. The plaintiffs' action is therefore dismissed with costs. The defendant is entitled to rectification of the agreement in accordance with the true agreement which reserved and excepted the coal mines and minerals and the right to work the same, and to judgment for the amount of the instalment in arrear at the time of action brought, together with interest thereon at the rate mentioned in the agreement, but, under the circumstances of the title, the plaintiffs are entitled to protection, and such instalment therefore shall be paid into Court until defendant's title is perfected or until further order. The defendant is entitled to the costs of the counterclaim. *Action dismissed.*

## MARTIN v. CAPE.

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*Quebec Superior Court, Archer, J.*

1. COURTS (§ I—2)—INJURY—EXAMINATION AT REQUEST OF DEFENDANT—SUBSEQUENT EXAMINATION—POWER OF COURT TO ORDER.

The court will not order and has no power to enforce an order for any further examination of the plaintiff in an action under the Workmen's Compensation Act, R.S.Q., arts. 7338-7346, where he has already submitted, at the request of the defendant, to an examination on the morning of the trial.

Statement

THE plaintiff claims, under the Workmen's Compensation Act, from defendant, his employer, a sum of $580, and an annual rent of $300, for permanent partial disability diminishing his earning power. His injury was caused by a fall from a scaffold at the height of 30 feet. His right hand was injured and he received a severe shock to his nervous system from which, he said, he will never recover. He alleged inexcusable fault against his employer.

The defendant's plea avers that plaintiff did not come under the Compensation Act, because he was earning more than $1,000; that the injuries suffered by him are in no way permanent.

The case offered only questions of facts with regard to the inexcusable fault, permanent partial incapacity of earning power, and amount of salary and indemnity. The judgment of the Court was for $149 and for an annual rent of $87.50. But during the *enquête* an important question of evidence was raised. The plaintiff was examined in Court by a physician.

The defendant, however, made an application for an order that he may be examined again by another physician. This order was refused.

*J. M. Ferguson*, K.C., for plaintiff.

*McLennan, Howard & Aylmer*, for defendant.

Archer, J.

MR. JUSTICE ARCHER:—I must say I was not very favourably impressed by this evidence, which went to a certain extent to contradict the evidence given by the two doctors, though I must accept it in part.

After hearing this evidence the Court suggested that plaintiff should be examined by a specialist of one of the leading hospitals. The plaintiff, through his attorney, refused to accept the suggestion. After reading over the evidence the Court called the attorneys before the Court and suggested again that plain-

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tiff should be examined by a specialist. Argument followed on this suggestion and the minute of proceedings reads as follows:—

At the opening of the Court plaintiff and defendant appeared by their attorneys. The Court suggests that an expert specialist of one of the leading hospitals be named to examine the plaintiff and report to the Court. Mr. Fergus.n appears for plaintiff and declares that he opposes any further evidence or expertise and further declares that should a further order be given his client would not submit to any further examination.

As the plaintiff had submitted to the examination of Dr. England, the morning of the trial, such examination being made at the request of defendant, I do not think that under our law the Court could make an order for a further examination of plaintiff by a doctor and that even if such order was given, the Court has no power to enforce such order. I am sorry to say that our law on this matter is far from being complete.

The only clause we have in the statutes as to medical examination of persons injured is art. 7338. It reads as follows:

[The learned Judge here cited the section in question.]

This clause gives only the right to an examination and does not give any further powers to the Court. Mr. Walton on his work, Workmen's Compensation Act, says:—

Under our article it is not very clear whether any examination is contemplated, except one to ascertain in the first instance if the compensation is due. But probably the article covers the case of subsequent examinations to ascertain if the incapacity still continues. Where the medical testimony is contradictory or inconclusive, the Court may of its own accord, or upon the application of either party, order the facts to be verified by a medical expert or by three experts. But the opinion of the experts is not with us conclusive as it is in England.

I do not think that under our civil law the Court has the right to compel the workman to submit himself to another examination.

Under our special Act, Workmen's Compensation Act, the law provides only for the examination mentioned in art. 7338 above cited.

The reasons for refusing to compel a claimant to submit to such examination are found in the following authorities: Beven on Workmen's Compensation, 4th ed., p. 675; *Union Pacific R. Co.* v. *Bothford U.S. Supreme Court*, 141 U.S. 250; *Whittaker* v. *Staten Island R. Co.*, 76 N.Y. App. Div. 351; *McQuigan* v. *D. L. & N. R. Co.*, 120 N.Y. 50; *Cole* v. *Fallbrook Coal Co.*, 87 Hun.

584; *French* v. *Brooklyn Heights R. Co.*, 57 Hun. 204; *Robertson, Ogdensburg* v. *Lake Champlain R. Co.*, 29 Hun. 154; *Reilly* v. *City of London*, 14 P.R. (Ont.) 171; *Fraser* v. *London Street R. Co.*, 18 P.R. (Ont.) 370 (Court of Appeal); *Agnew* v. *Johnson* (1877), 13 Cox C.C. 625; *Mousseau* v. *City of Montreal*, 4 R.P. 38; *Gareau* v. *Montreal St. R.*, 1 R.P. 566.

QUE. S.C. MARTIN v. CAPE. Archer, J.

In England a Judge of a County Court may summon a medical referee to sit with him, if necessary. He may also subject to and in accordance with the regulations made by the Secretary of State and the Treasury submit to a medical referee for report any matter which seems material to any question arising in an arbitration.

According to the rules and regulations as to medical referees, it is said that before making any reference, the committee, arbitrator, or Judge, shall be satisfied, after hearing all medical evidence tendered by either side, that such evidence is either conflicting or insufficient on some matter which seems material to a question arising in the arbitration, and that it is desirable to obtain a report from a medical referee on such matter.

I consider that such practice would promote justice in this province. If the Court had the evidence of a doctor who had followed the plaintiff for some time and who would have examined him at intervals the assessment of damages would have been more satisfactory. *Judgment for plaintiff.*

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## DAVIS ACETYLENE GAS CO. v. MORRISON.

ONT. S.C.

*Ontario Supreme Court, Appellate Division, Falconbridge, C.J.K.B., Hodgins, J.A., and Riddell and Latchford, JJ. June 2, 1915.*

1. PLEADING (§ VI—355)—AFFIDAVIT OF DEFENCE—LEAVE TO FILE STATEMENT—COUNTERCLAIM.
   Rule 56(5) (Ont.) authorizes the granting of leave to deliver a statement of defence only when it sets up a further answer to the claim other than that contained in or provable under the affidavit, and does not include a counterclaim.
2. PLEADING (§ III A—300)—STATEMENT OF DEFENCE—LEAVE TO SERVE—NOTICE—EX PARTE.
   An application for an order to serve a statement of defence under Rule 56 (Ont.) should be made on notice and not *ex parte*.
   [*Joss* v. *Fairgrieve* (1914), 32 O.L.R. 117, followed.]
3. COURTS (§ II D—190)—COUNTY COURT—SENIOR AND JUNIOR JUDGES—DIVISION OF DUTIES—ORDERS AND OPINIONS.
   The powers and duties of the junior and senior judges of the County Court, although divided for the convenience of the public, are in respect of orders therein made identical, and neither can abdicate his powers or divide his duties in interference with the rights of litigants.

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4. APPEAL (§ I B—6)—FINALITY OF DECISION—ORDERS OF COUNTY COURT—STRIKING OUT PLEADINGS.

An order of a senior judge of the County Court setting aside an order of the junior judge which granted leave to file a statement of defence under Rule 56(5) (Ont.), and striking out a counterclaim filed thereunder is final in its nature from which an appeal will lie. [County Court Act, R.S.O. 1914, ch. 59, sec. 40(2); *Smith* v. *Traders Bank* (1905), 11 O.L.R. 24; *Brennen & Sons* v. *Thompson*, 22 D.L.R. 375, followed.]

Statement

APPEAL from an order of the Senior Judge of the County Court setting aside a statement of defence and counterclaim.

*D. Inglis Grant*, for appellant.

*Featherston Aylesworth*, for plaintiffs, respondents.

Riddell, J.

RIDDELL, J.:—On the 10th March, 1915, the plaintiffs issued a specially endorsed writ from the County Court of the County of Lambton; on the 22nd March, the defendant entered an appearance with a sufficient affidavit of merits under Rule 56. The rule is as follows:—

(1) Where the writ is specially endorsed the defendant shall with his appearance file an affidavit that he has a good defence upon the merits and shewing the nature of his defence, with the facts and circumstances which he deems entitle him to defend the action and shall forthwith serve a copy of such affidavit upon the plaintiff. The affidavit may be made by the defendant or by any one having knowledge of the facts.

(2) If the plaintiff so elects he may then treat the claim endorsed upon the writ, and the affidavit, as constituting the record, and may within five days serve notice of trial. In such case the defendant shall be entitled to 21 days' notice of trial.

(3) Either party may then have discovery and shall make production as in ordinary cases.

(4) If the defendant fails to file an affidavit the appearance shall not be received and the plaintiff shall be entitled to sign judgment for default of appearance.

(5) A defendant may obtain leave to deliver a statement of defence setting up any further or other answer to the plaintiff's claim.

The plaintiffs elected, under Rule 56(2), to treat the endorsed claim and the affidavit as the record, applied on the 27th March to the Senior Judge for a day for trial, and obtained the 21st April for that purpose—they then served notice of trial under Rule 56(2).

The defendant, on the 30th March, applied *ex parte* to the Junior Judge, and obtained an order allowing him to file a statement of defence: Rule 56(5); he filed a statement of defence and counterclaim, which the Senior Judge set aside on the 12th May. The defendant now appeals.

The reasons given by the learned County Court Judge are as follows:—

"Prior to the 21st April, on account of the illness of the defendant, it was necessary to postpone the trial, as he was unable to attend; and, on this application coming before me, it was mentioned that His Honour Judge Taylor had granted an order, dated the 30th March, under the Rule, allowing the defendant to file a statement of defence. On interviewing Judge Taylor, I found out that, although I attend to all County Court matters, unless out of town or ill, an application had been made to him, although I was in town and in my Chambers on that day, without informing him that on the 27th March I had given an appointment to try the case on the 21st April, and that notice of trial had been filed and served for that day: he was neither informed of my presence in town, nor that the record had been closed under the Rule.

"Further, on a perusal of the affidavit filed with the appearance, I was of opinion that the affidavit would permit the defendant to bring up at the trial all that the statement of defence contained.

"For these reasons I set aside the order made by His Honour Judge Taylor, and refused leave to file a statement of defence. The Junior Judge should have been informed that I was in town, and also that, under clause 2 of Rule 56, the record was closed five days after the appearance and affidavit were filed, which took place on the 27th March, and that on the latter day I had set a date for the trial."

I do not think that the learned Judge intended to make it a ground for his order that application was made to the Junior Judge rather than to himself—the powers and duties of the two Judges are, in all matters material here, identical, and neither can abdicate his powers or abrogate his duties. It is, no doubt, sometimes very convenient that their duties should be divided: but that convenience should be the convenience of the public, not of the Judges—and no such division of duties can interfere with the rights of litigants. Judges are the servants not the masters of the people. Neither is it any ground that the Senior Judge was seized of the case and had made an order for its trial—no doubt,

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the Junior Judge, had he been made aware of that fact (as he should have been), would have referred the matter to the Senior Judge; the omission to do so, however, does not render the order irregular or improper.

The application for the order to serve a statement of defence was *ex parte*, and not, as it should have been, on notice: but I do not proceed on the ground that this may make the order improper.

It may be that Rule 56 contemplates that the defendant shall set out in his affidavit all the facts and circumstances constituting his defence—I think it does—but if, by mistake, inadvertence, or even intention, an omission be made, I do not think that the defendant is precluded in every case from setting up the omitted facts as a defence. An application made under Rule 56(5) will be treated by the Judge who hears it in much the same way, as to costs and otherwise, as any other application to amend the record.

The real question to my mind is as to the relevance of the statement of defence and its effect if allowed—for, if the record as it stood before the statement of defence would allow all the facts to be proved, as the learned Judge thinks, there is no need of the statement of defence, and it was properly set aside. Rule 56(5) allows a statement of defence only which sets up a "*further* or *other* answer to the plaintiff's claim."

The claim is for the balance due upon a written order for a Davis generator etc.; the affidavit of the defendant sets out: (1) "a good defence on the merits;" (2) the goods were defective and not as represented, nor were they installed in proper working order as agreed by the plaintiffs; (3) if a written order was signed, the defendant's signature was obtained "through misrepresentation as to the quality of the machinery and the results to be obtained therefrom."

This is in effect saying: (a) I do not admit signing any order; (b) if I did, my signature was obtained by misrepresentation both as to the quality of the goods and the results to be obtained therefrom; (c) the goods were not as represented, but were defective; (d) and were not installed in proper working condition.

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The statements (c) and (d) may mean that it was a condition precedent to liability that the goods should be as represented and must be installed in proper working condition—the plaintiffs, electing, as they did, to take the affidavit as the defence, must be considered as electing to meet these allegations or to submit to their having every possible effect, whether by way of condition or warranty, justified by the facts as proved. Looking now at the statement of defence; para. (1) is general; (2) sets up, as a condition precedent to liability, installation in proper working condition and capacity to light the defendant's residence—this is covered by (c) and (d) above. Para. (3) simply alleges failure in the condition mentioned in para. (2). Para. (4) sets up as a condition precent that the plant would operate for 30 days with one filling with carbide, whereas it would work only 6 days on one filling. This may fairly be considered as coming under (c). Para. 5 sets out as a condition precedent that the lighting by the goods supplied should be not more expensive than by coal oil lamps—this also comes under (c). Para. 6 sets up as a condition precedent that the plant supplied would "properly, efficiently, and economically light the defendant's residence—this also comes under (c). But this paragraph adds "that the installation of this plant would not affect the defendant's insurance upon the building" as a representation—it is not said that this was a condition precedent to liability—but I presume it was intended so to be pleaded, and not by way of damages for breach of warranty or the like, since the "counterclaim" does not mention it. By a little stretch of the language, this may come under (c). In view of the intimation by the County Court Judge that he was of opinion that, without any amendment or statement of defence, the defendant might prove at the trial all he alleges in the statement of defence, I think the defendant might well have been satisfied—no appellate tribunal would think of reversing the trial Judge in such a matter. This contest is all over a petty matter of pleading, with an expression of opinion by the trial Judge in favour of the appellant.

There is a more important matter—the defendant sets up a counterclaim. Rule 56(5) does not give power in so many words to grant leave to file a counterclaim: and, in view of the

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language of Rule 112, I do not think that "statement of defence" in Rule 56(5) includes a counterclaim. The case of a defendant to a specially endorsed writ desiring to counterclaim, when the plaintiff elects under Rule 56(2), seems to be a *casus omissus*: and I think no power is given in such a case to allow a counterclaim to be pleaded. All that can be set up is a "further or other answer to the plaintiff's claim," which a counterclaim is not. Whether a defendant can in his affidavit under Rule 56(1) set up a counterclaim, I do not consider. What is intended to be decided is that Rule 56(5) does not authorise a counterclaim. (I may add that here the order of the Junior Judge does not speak of a counterclaim.) The difficulty, however, is only technical—if the defendant had a real counterclaim (speaking generally) the Court would not permit execution to go for the full amount of the claim until the counterclaim could be tried.

A question was raised as to the right of appeal: but *Smith* v. *Traders Bank* (1905), 11 O.L.R. 24, approved by this Court in *M. Brennen & Sons Manufacturing Co. Limited* v. *Thompson* (1915), 22 D.L.R. 375, is conclusive that an appeal will lie.

On the merits I think the appeal should be dismissed with costs.

Falconbridge, C.J.K.B. Latchford, J.

FALCONBRIDGE, C.J.K.B., and LATCHFORD, J., concurred.

Hodgins, J.A.

HODGINS, J.A.:—I concur in the dismissal of the appeal, on the ground that the order of the Junior Judge, having been made *ex parte*, could not be supported and therefore was properly set aside: *Joss* v. *Fairgrieve* (1914), 32 O.L.R. 117.

In view of the expressions of opinion by the Senior Judge and by the majority of this Court as to the ground covered by the affidavit of the defendant, the leave obtained turns out to have been unnecessary.

If the defendant's right to set up a counterclaim as a defence to the action were necessarily involved in this appeal, I should doubt whether he is debarred by the language of Rule 56 from obtaining leave to plead it. But it is not necessary to decide this, as he did not obtain leave to counterclaim.

*Appeal dismissed with costs.*

## LINDSAY v. EMPEY.

ALTA.

S. C.

*Alberta Supreme Court, Simmons, J. September 8, 1915.*

1. ASSOCIATIONS (§ I—2)—FRATERNAL SOCIETIES—PROPERTY RIGHTS—REVIEW BY COURTS.

Ordinarily, courts of justice will not interfere with the actions of fraternal societies, unless rights of property are involved.

2. ASSOCIATIONS (§ II—6)—FRATERNAL SOCIETIES—RIGHTS OF MINORITY—PROPERTY RIGHTS.

The power of assembly guaranteed by the constitution of the supreme body of a fraternal society to the minority members of a subordinate constituency in the event of a withdrawal of the majority, and a by-law specifically providing that the property and effects thereof are to be held by the principals to the use and benefit of the constituency, the action of the seceding majority alien to such purposes is *ultra vires*, and the Courts will compel the return of the property to the remaining minority.

[*Free Church of Scotland* v. *Overtoun*, [1904] A.C. 515; *Craigdallie* v. *Aikman*, 1 Dow. 1, applied.]

Statement

ACTION by the minority of a fraternal society for return of property.

*A. H. Clarke*, K.C., for plaintiff.

*W. F. W. Lent*, for defendant.

Simmons, J.

SIMMONS, J.:—The plaintiff sues on behalf of himself and all other officers and members of Alberta Chapter No. 106 of Royal Arch Masons of Canada, and claims the return of certain property of the plaintiff which the defendants wrongfully refuse to deliver up and return to the plaintiffs.

Alberta Chapter No. 106 of the Royal Arch Masons of Canada was established in 1893 in the then Territory of Alberta under a warrant of constitution from the Grand Chapter of Royal Arch Masons of Canada with headquarters in the Province of Ontario, which claimed territorial jurisdiction in the Province of Ontario, Manitoba, Saskatchewan, Alberta and British Columbia and the North-West Territories of Canada. By art. 3 of the constitution of the Grand Chapter, in it alone is vested general government and control and the power of enacting laws and regulations for the government of all Chapters of Royal Arch Masons. Sec. 70 provides that every Chapter has power to make or amend such by-laws as it may seem meet for its own private government, provided they be not incompatible with the general laws of the craft or the statutes enacted by

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the Grand Chapter and such by-laws before becoming operative must be approved by the Grand Chapter.

By sec. 79 of the constitution it is provided that

if the majority of members withdraw from a chapter the power of assembly exists with those remaining, provided their number be not less than 9, but if less than 9 remain, the Chapter becomes extinct, and its warrants, records and the property revert to Grand Chapter.

In 1914 a majority of the Chapters in Alberta, including Alberta Chapter No. 106, passed resolutions expressing their loyalty and devotion to the Grand Chapter of Canada and also expressing their approval of the formation of a Grand Chapter of the Royal Arch Masons for the Province of Alberta. A convention of members was held in Calgary, and by a vote of the majority of members the Grand Chapter of Royal Arch Masons was elected and established as the supreme and governing body of Royal Arch Masonry in Alberta.

A majority of the members of said Chapter 106 were constituted Chapter No. 1 of the Grand Registry of Alberta, and took with them the property of Alberta Chapter 106, including regalia, cash and mortgages.

Alberta Chapter 106 had adopted a by-law No. 21, which was duly approved by the Grand Chapter and was as follows:—

All matters not otherwise provided for in the constitution or these shall be decided by a majority of open votes.

And by-law No. 22, which provides that:—

The jewels, robes, furniture and other appendages belonging to this Chapter shall be and are hereby vested in these principals for the time being in trust for the use and benefit of the Chapter to be disposed of only by votes of two-thirds of the companions present in open Chapter.

And by-law No. 23:—

No portion of the furniture, jewels, paraphernalia or other property of the Chapter shall be sold or alienated or in any way disposed of except by two-thirds majority of the members present to be specially notified of that intention on summons calling the next convocation.

The plaintiffs are a minority of the members of Chapter 106 of Alberta exceeding nine in number.

The Grand Chapter of Canada has refused to approve of the action of the majority of the members of Chapter 106, in

which they transferred their allegiance to the newly established Grand Chapter of Alberta.

The defendants allege the transfer of allegiance was something the defendants had the right to do and that it was not *ultra vires* of their constitution and that said transfer carried with it the right to the property of Chapter 106.

By-law of Chapter 106 provided that the property was held in trust for the use of the Chapter, and by-law 23 provided for the manner of disposition of this property. Since the Chapter 106 derived from the Grand Chapter its right in the first instance to exist and to make by-laws and acknowledged the supremacy of the Grand Chapter as to general control and government, its by-laws must be read and interpreted strictly, and unless the local by-laws in plain language express an intention to override the provisions in the constitution of the Grand Chapter relative to the disposition of property, the provisions of the Grand Chapter will apply.

Section 79 of the Grand Chapter has specifically provided for the case now the subject for this action.

The defendants admit a transfer of their allegiance from the Grand Chapter of Canada. That provides a withdrawal from the Chapter within the meaning of section 79. The plaintiffs are a minority larger than nine and are recognized by the Grand Chapter of Canada as having the power of assembly, and this must, of necessity, carry with it the rights, powers and obligations of Chapter 106.

The general principles on which the Court will act in regard to the enforcement of a trust in favour of a composite body comprised of constituent members is enumerated by the Earl of Halsbury, L.C., in the *Free Church of Scotland* v. *Overtoun*, [1904] A.C. 515; *MacAllister* v. *Young*, [1904] A.C. 613.

Lord Halsbury cites with approval the dictum of Lord Eldon in *Craigdallie* v. *Aikman* (1812), 1 Dow. 1.

With respect to the doctrine of the English law on this subject, if property was given in trust for A. B. & C., etc., forming a congregation for religious worship. If the instrument provided for a case of a schism then the Court would act upon it, but if there was no such provision in

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the instrument and the congregation happened to divide, he did not find that the law of England would execute the trust for a religious society at the expense of a forfeiture of their property by the *cestuis que trust* for adhering to the principles in which the congregation had originally united.

In the case of the *Free Church of Scotland* v. *Overtoun*, [1904] A.C. 515, no provision was made for the case of schism in the creation of the trust.

In the present case, however, specific provision has been made for this happening as section 79 has fully covered the case and the by-laws of the local Chapter Nos. 21, 22, and 23 do not contain anything repugnant to the effectiveness of said 79. The alienation of property provided for in section 23 of the local by-laws must be confined strictly to an alienation for and on behalf of and for the benefit of Chapter 106.

The attempt to make said section 23 of the local by-laws effective for an alien purpose is clearly *ultra vires* and, therefore, ineffective.

It is a matter of interpretation of the constitution of the Grand Chapter and the local by-laws in which ample provision was made in the constitution of the Grand Chapter and to which all parties had agreed mutually to be bound. Fortunately no question of relative jurisdiction requires consideration, as the plaintiff's claim is confined to one for recovery of property.

There will be judgment that the plaintiffs are entitled to the property in question with a reference if necessary to take an account of the same, and the plaintiffs to have costs of the action.

*Judgment for plaintiff.*

# MEMORANDUM DECISIONS.

Memoranda of less important Cases disposed of in superior and appellate Courts without written opinions or upon short memorandum decisions and of selected Cases decided by local or district Judges, Masters and Referees.

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**MELFORT INVESTMENT CO. LTD. v. MACKENZIE, MANN & CO.** SASK.

*Saskatchewan Supreme Court, Elwood, J. July 12, 1915.* S. C.

VENDOR AND PURCHASER (§ I C—13)—*Failure to deliver good title—Caveats—Return of money paid—Orders of Local Master.*]—Appeal from a Local Master.

*P. H. Gordon*, for plaintiff.

*B. D. Hogarth*, for defendant.

ELWOOD, J.:—On April 9, 1915, the Local Master at Prince Albert ordered the defendant, within 30 days of the service of the order, to deliver a good and sufficient transfer and title of property mentioned in the agreements or contracts referred to in the statement of claim, clear of all encumbrances.

So far as the defendant was concerned, and in default of such delivery, the plaintiff had leave to apply to a Court or Judge for judgment in the amount of the moneys paid under the said agreements, with legal interest. In pursuance of this order, the defendant, on May 10, 1915, served upon the agent for the plaintiff's solicitor a transfer of the lands to the plaintiff from the defendant and one Adam Henry Anderson. When this transfer was lodged with the Registrar it was found that the land in question was registered in the name of the defendant and the said Anderson under a certificate of title dated May 12, 1915, and subject to a caveat made by one Smart, dated and registered on May 11, 1915.

The plaintiff took out a summons for liberty to sign judgment against the defendant for the amount of the moneys paid by the plaintiff to the defendant under the agreement of sale, and, pursuant of said order, on the ground that the defendant had failed to deliver a title free of encumbrances.

From the material filed it would appear that the said Smart claims to be entitled to a one-half interest in one of the lots covered by said agreement, under an agreement dated March 1, 1912, by which the said Anderson purported to sell to the said Smart a one-half interest in said lot, and it was under that agreement that the caveat was filed.

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The evidence further shews that, at the time of the delivery of the transfer to the agent for the plaintiff's solicitor, the caveat was not filed.

It will be noticed that the order of April 9 directed delivery to the plaintiff of the transfer of title; it will be also noticed that the delivery was made, not to the plaintiff, but to the agent of the plaintiff's solicitor.

On the argument before me no objection was taken to this delivery, but, from the fact that the plaintiff's solicitor's address for service was at an office in Prince Albert, I assume that the plaintiff's solicitor resides outside of Prince Albert, and that, therefore, in the usual course the transfer would be forwarded by the agent to the solicitor before being sent for registration, and that it was through no fault of the plaintiff that the transfer was not forwarded to the Registrar on the date that it was received; and that it was through no fault of the plaintiff that it was not forwarded to the Registrar in time to be registered before the caveat.

On the return of the motion before the Local Master, an affidavit of one Reid was filed on behalf of the defendant, in which, *inter alia*, the said Reid stated that he was informed by telegram that the defendant had made a division with the said Smart of their interests in respect to certain properties; that, pursuant to such division, Anderson, on behalf of the said Smart, had executed a transfer of the land in question to the plaintiff.

It will be noticed that Reid does not swear that he believes the above to be true, but simply that he is "informed"; nor does he state the date of the execution of the transfer, or that it was ever delivered to the plaintiff.

I am of the opinion that it was in consequence of the defendant's not being registered in its own names to the lots in question that the cloud on the title arose, and that, as it did not deliver to the plaintiff a transfer from itself alone, accompanied by a certificate of title to the lands registered in its own name alone, it is responsible for the registering of the caveat against the title of Anderson, at any rate, as the registering of that caveat arose through no fault or neglect of the plaintiff.

This being so, then I am of the opinion that the Local Master erred in dismissing the application. The result will be that the matter will be referred back to the Local Master to direct a

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further time for the defendant to clear the title. In default the plaintiff will have leave to apply to the Court or a Judge for judgment for the amount of the moneys paid under the said agreements, with legal interest, and costs, and for such further and other relief as the plaintiff may be advised. The plaintiff will have its costs of the application to the Local Master, of this appeal and of the further reference. *Appeal allowed.*

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## CROSSMAN v. PURVIS.

ALTA.

S. C.

*Alberta Supreme Court, Beck, J. August 14, 1915.*

COSTS (§ I—14)—*Security for—Past and future costs—Plaintiff's absence from province—Interpretation of contract—Questions of law.*]—Motion for security for costs.

*E. B. Edwards*, K.C., for the motion.

*A. U. G. Bury, contra.*

BECK, J.:—I think our rules leave the questions whether security should be given or not, and the amount of the security if ordered, and whether it shall apply to past as well as future costs, to the judicial discretion of the Judge; that the granting of an order, in the event of the plaintiff being shewn to fall within any one of the eight cases mentioned in rule 9 of the Rules as to Costs, is not a matter of course.

The plaintiff left the province after the commencement of the action on the advice of his medical adviser, and is now residing in his parents' home. Everything points to his not returning. But he has been absent over a year to the knowledge of the defendant, and in the meantime costs to a considerable amount have been incurred.

Though I think that under our rules an application for security for costs may be made at any time, and may when made cover past as well as future costs, I think it should not cover past costs unless the application has been made promptly after the defendant has become aware of the circumstances justifying his motion. Such a motion sometimes has the result, owing to the plaintiff's circumstances, of his having to abandon his action. It seems to me that it is unreasonable that the defendant should be in a position first to encourage the plaintiff to incur large costs and then suddenly take a step which may result in the dismissal of the action. At the present time the action stands on the trial

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list and fixed peremptorily for the sittings commencing on September 20 next. It is said that the trial necessitates the attendance here from Toronto of the defendant as a witness. *Primâ facie*, however, the case is one depending wholly on the question of law whether certain telegrams constitute a binding contract for the sale of land. It is said that if they do then there will be a question of fact remaining to be tried, namely, that the defendant, having advertised his land for sale and having answered the plaintiff's telegram as to his price and terms, did so intending that he should be free to accept any one of any number of proposals he might receive.

Assuming that as a matter of law this would constitute a defence, it can be proved, by taking the defendant's evidence under commission, I think, with equal advantage to the defendant, inasmuch as his evidence, it appears, can be supported by correspondence with others than the plaintiff, and the plaintiff is not in a position to contradict the defendant's evidence in any respect.

I cannot on this motion force the defendant to take this suggestion, but I am at liberty to consider it in relation to the amount of security.

The plaintiff is willing to have the question of law, namely, whether the telegrams on their face make a complete contract, determined as a preliminary question. I think the defendant should agree to this, and thus attempt to save large costs, the incurring of which may turn out to be useless.

On the whole, I think a proper order to make is this: The plaintiff is to give security for the plaintiff's future costs by paying into Court $50 or giving a bond with sureties to the satisfaction of the clerk in $100 within one month, in default the action to be dismissed. If the defendant consents, the question of law will be first determined. If it is determined adversely to the plaintiff, that will end the action, subject to an appeal, in which event the defendant may apply for security for costs of the appeal. If it is determined in favour of the plaintiff, the defendant may apply for further security for future costs. *Motion granted.*

MAN.
K. B.

**REID v. PIPESTONE.**

*Manitoba King's Bench, Prendergast, J. August* 24, 1915.

CONTRACTS (§ IV D—360)—*Installation of telephone system—Performance—Plans and specifications—Certificate of engineer—Extra work.*]—Action on a building contract.

MAN.

K. B.

*H. E. Henderson*, K.C., and *J. H. Chalmers*, for plaintiff.

*G. W. Bruce*, K.C., for defendants.

PRENDERGAST, J.:—The plaintiff, who is a contractor, claims a balance on 3 classes of extras in connection with 2 contracts for the erection and installing of a telephone system in the said municipality.

The plaintiff first entered into a written contract on September 28, 1908, to build, erect, wire and install a telephone system according to plans, drawings and specifications, all work to be passed upon and disputes settled by the engineer appointed by the Government, and no extras to be done or allowed unless on the joint order of such engineer and the secretary-treasurer of the municipality.

The plaintiff performed the work as called for, and now claims that 22 railway crossings on the course of the line are extras. The engineer admitted in his evidence that it was due to an oversight that these crossings were not specially provided for and considered in the specifications. In fact, on his recommendation, the plaintiff has already been paid an extra of $25 per crossing; but he now claims at $35 per crossing, a balance of $220. His ground for claiming this balance is wholly that he was delayed in his work by the fact that the poles required had not been hauled to the station when he came to a railway crossing, which forced him later to go back 4 or 5 miles with 5 or 6 men, and also that the holes he dug for the poles filled up during the delay and had to be dug out again.

The plaintiff was the only witness on his behalf. From the evidence of the reeve and secretary-treasurer of the municipality, and from that of the engineer, it appears that the reasons for complaint on account of delay were very much more on the side of the Council than on that of the plaintiff, and that every time that the latter laid the blame on the want of material the inspector satisfied the Council that the material was reasonably available as it was required. The fact is, that owing to causes upon which it is not necessary to insist, the plaintiff neglected very much his business, and that the Council had largely to follow it up all the time, and finally to virtually take it in hand and finish it. The lack of proper supervision was, I have no doubt, the cause of loss in the time of his men and teams, but he was mainly responsible

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for that. But, even then, the distances that he had to travel were taken into consideration in some instances. The poles at Finlay were apparently the only ones that were some distance away, and he was allowed $20 for that. He was also allowed $40 and $5 on the same account, and also, as it seems, the further sum of $89.89. It would also appear that in giving the time of his men and teams the plaintiff makes no allowance for the fact that they were also employed at the time on other work of his own, which he admits in evidence. I should also say that some at least of the crossings were apparently computed in the measurements of the line for which he was paid for as a whole. I think that the amount which he has already received fully compensates him. And I would here say generally, with reference to all the items in issue, that in such a case as this, where the engineer appointed by the Government was made by the agreement the arbiter in all disputed matters, it surely is incumbent on the plaintiff, if his case is to be considered at all, that he should support it by decided and unmistakeable preponderance of evidence.

The second extra claimed under the said contract is for installation of 6 telephones in the townsite of Sinclair, for which he has already received $220 on the engineer's recommendation, claiming a balance of $164.70. I find that the plaintiff in fact never put in with the Council or engineer an intelligible account of this item. The time that he claims was put in on this work was taken, as he says, from a book kept by one of his men, who is now away. But several of those entries are disproved by time sheets or reports put in by the inspector. The Government engineer also says that it is altogether impossible that all the time as charged should have been put on this work. His claim that the reeve agreed in the presence of the Council that he should have 40 per cent. for use of tools is emphatically denied both by the reeve and by the secretary-treasurer. The plan of this work which the plaintiff put in (ex. 17) seems also to be indefinite, and shews inaccuracies both as to the number of poles and number of telephones. My general observations with respect to the first item will also apply here. In short, I would rather believe that the plaintiff has been even liberally dealt with as to this last item.

The second contract was for the installation of the system in the villages of Reston and Pipestone, for $1,250. Its terms are

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set out in the plaintiff's tender of November 16, 1908 (ex. 5), which contains also the words:—

> All extra work done in the villages to be settled in accordance with the terms of contract made for the rural work,

which is the contract first hereinabove referred to.

The plaintiff claimed extras on that work amounting to $870.05, for which he was allowed $370 by the Government engineer, leaving a disputed balance of $500. The plaintiff claims for this work on a unit basis, on the ground that the rural work referred to in his tender was on a unit basis. Defendants, on the other hand, object that a unit basis for this work could not have been intended, as there are barely two or three items as to which the two contracts correspond. At the same time, I should say that the engineer, whilst broadly stating in evidence that the $370 he allowed was valued on constants in use in his office, admitted that he did not work out the same himself, and could not give particulars as to how they were made up. I must then take, at least as a working basis, the plaintiff's statement as the only one which is really before me. On the engineer's evidence, however, I will strike out $180 from the Reston work and $80 from the Pipestone work ($137.50 of which is deducted from wiring in the two villages), leaving a balance of $240.

There will be judgment for plaintiff for $240, with County Court costs, and without right of set-off. I would allow a counsel fee of $25. *Judgment for plaintiff.*

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### Re KILDONAN AND ST. ANDREWS ELECTION.

C. A.

*Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. April 12, 1915.*

[*Re Kildonan and St. Andrews Election*, 21 D.L.R. 389, affirmed.]

ELECTIONS (§ IV—94)—*Contests—Procedure—Defective petition—Failure to publish notice.*]—Appeal from 21 D.L.R. 389.

*F. M. Burbidge*, for appellant.

*J. E. Adamson*, for petitions.

The appeal was dismissed.

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### Re A SOLICITOR.

SASK.
S. C.

*Saskatchewan Supreme Court, Haultain, C.J., Lamont, Brown, Elwood, and McKay, JJ. July 15, 1915.*

SOLICITORS (§ I B—10) — *Suspension—Grounds—Failure to turn over collections.*]—Proceedings by the Law Society for professional misconduct.

SASK.

S. C.

*H. E. Sampson*, for Law Society.

The judgment of the Court was delivered by

HAULTAIN, C.J.:—The facts of this case quite justify, in my opinion, the proceedings taken by the Law Society.

There seem to be some extenuating circumstances, but the bald facts are that money which was collected by a solicitor in May, 1912, was only paid over early in 1915, under stress of an execution issued in an action which the client was forced to bring to recover the money. We have already pointed out that the disciplinary sections of the Legal Profession Act were not merely passed for the purpose of enforcing payment over by solicitors of money collected by them for their clients.

In every case, the conduct of the solicitor in the premises is a proper subject for the consideration of the Court on an application of this sort. In the present case there are some extenuating circumstances, but not sufficient to justify a delay and neglect which, in my opinion, constitute professional misconduct.

I think that the disapproval of the Court will be sufficiently expressed by ordering suspension until September 1 next. The solicitor will, of course, pay the Law Society all costs.

*Judgment accordingly.*

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ALTA.

S. C.

## CROMWELL v. MORRIS.

*Alberta Supreme Court, Hyndman, J. September 10, 1915.*

CONTRACTS (§ V C3—402)—*Timber limits and licenses—Estimates—Misrepresentations—Rescission of agreement — Counterclaims.*]—Action for rescission of agreement for sale of timber limits.

*O. M. Biggar*, K.C., for plaintiff.

*C. C. McCaul*, K.C., for defendant.

HYNDMAN, J.:—At the conclusion of the trial I felt satisfied that some of the material representations made in the Morris and Harty reports were not correct, especially the most important one, *viz.*, the statement with regard to the quantity and quality of the timber and topography of the land. According to the estimates in exs. 1 and 2, there was supposed to be approximately 800,000,000 feet of timber, whereas the cruiser Henry Woods, estimated only about 192,000,000. In my opinion Woods was in a much better position to form a correct estimate on this point than Harty, he having spent about three weeks going over the

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property carefully and systematically, whereas Harty was there less than a week, and in that time, in my opinion, could not possibly cruise a large area such as this thoroughly.

As to the area and number of the limits and licenses owned by the defendant, I must find that there was no misrepresentation, however valueless some of the limits covered by the licenses may have been, the defendant having produced evidence shewing that valid licenses covering the area claimed by him existed.

After a very great deal of consideration, however, I am forced to the decision that plaintiff cannot succeed in the action. Up to the time of the agreement in question Morris had never himself visited or seen the limits, and was guided entirely by information received from others, and especially from the Harty report. I am satisfied Morris believed he had a very valuable property, and had faith in Harty's report. Consequently I must find that the misrepresentations referred to were made innocently. The evidence is clear, also, to the effect that plaintiff was aware of the fact that defendant had never seen or been on the property, and was guided and relied on Harty's report.

Mr. Biggar laid stress on the point that Morris' report went farther than Harty's, inasmuch as it refers to "estimates" of "cruisers," the inference being that other cruises had been made. If the evidence established the fact that plaintiff was influenced by this statement and was led to believe that other cruises had been made, I think he would be entitled to succeed in the action. But, unfortunately, the plaintiff stated clearly that he knew Morris had never seen the limits, that he (Morris) went on Harty's report, that he understood that Morris made his estimates from Harty's report, and further, that he himself relied on Harty's report through Morris. This evidence, therefore, in my opinion, excludes me from finding that plaintiff did any more than rely on ex. 1. It is not found anywhere in the evidence that Morris believed otherwise than that the report was reliable. It would appear to me, therefore, that to the knowledge of the plaintiff the representations complained of made by Morris were merely matters of opinion based on Harty's report, and, in the absence of knowledge by the defendant that same were untrue and of fraud, or that defendant did not believe what he represented as his opinion, not such as entitles plaintiff to rescission of the agreement. In brief, the plaintiff was made aware by the de-

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fendant that he had no personal knowledge of the facts, and that all his estimates and statements were based on the report of Harty which plaintiff was handed, and had therefore exactly the same opportunity for forming an opinion as defendant had, and himself relied and was prepared to take chances on ex. 1. There is further evidence that plaintiff was aware that no proper survey or estimate had theretofore been made, except, of course, Harty's report. In his letter to the defendant, May 8, 1914, ex. 17, he says in part:—

> I hope to be in Edmonton in the fore part of June and will bring with me a good woodsman to look over this limit and make a report on it. . . . I would like very much if you could spare the time for us both to go and spend a few days on the limit. We will then be in a position to know exactly what we have and what is best to do with it, as I hope, if it is as you represent it to me, we will be able to dispose of it during the summer.

Again, in his letter of June 10, 1914, ex. 18, the plaintiff says in part:—

> I expect to have a good timber man with me, and we will see what we have got up there.

If, then, the statements made by defendant were, as a matter of fact, opinions based on Harty's report, and this was communicated to the plaintiff, in my view of it the action must fail.

> If a man, having a genuine opinion or possessing information on any matter chooses nevertheless to state it as a fact, the statement is a misrepresentation pure and simple and its falsity is established by mere proof of the incorrectness of the opinion or information so stated. But if he states his information or opinion merely as such, he makes no representation of its correctness or of anything except the fact that he has such opinion or information. 20 Hals. 667.

This appears to me to be the situation in the case at bar. The action will therefore be dismissed with costs. The defendant will be entitled to judgment on his counterclaim for $7,500, and interest at 5 per cent. per annum from June 30, 1914, and to one-half the amount necessarily paid by the defendant in connection with preserving title to the limits in question, the correct amount to be settled by reference to the clerk, with liberty to either party to apply for further directions. *Action dismissed.*

MAN.

K. B.

## ROBERTS v. NATIONAL TRUST CO.

*Manitoba King's Bench, Prendergast, J. August 7, 1915.*

EXECUTORS AND ADMINISTRATORS (§ II A2—44*a*)—*Conduct of estate—Homestead and pre-emption lands—Mortgage by executor—Infant devisees—Right to have trust declared.*]—Action to have the defendant declared a trustee for the plaintiff.

*A. Howden* for plaintiff.

*G. W. Bruce*, for defendant.

PRENDERGAST, J.:—On August 18, 1884, John Roberts, the elder, made homestead entry for the south-east quarter of section 6 (hereinafter described as the homestead), and was duly recommended for patent therefor on August 6, 1890.

On April 3, 1891, the said John Roberts, the elder, made pre-emption entry for the south-west quarter of section 6, which is the quarter section in issue (hereinafter referred to as the pre-emption), and made part payment therefor to the Crown.

On June 20, 1891, the said John Roberts, the elder, made his last will and testament, whereby, after directing payment of his just debts and funeral and testamentary expenses, he devised the homestead to John Roberts, the younger, a grandson then living in Ontario, as soon as he should attain the full age of 21, and the pre-emption to another grandson, who is the plaintiff in this action, also as soon as he should attain majority, with the direction that whatever claim in money the Government might hold against the said pre-emption should be paid in equal shares by the said two devisees. John Franklin Roberts, a son of the testator and father of the plaintiff, was appointed executor under the will. On September 4, 1891, the said testator died, the two said devisees being then about nine years of age.

On or about February 6, 1892, John Franklin Roberts applied for probate of the said will, declaring upon oath that the real estate of which the said testator died possessed consisted of the south half of said section 6, and he was duly granted probate on the said date. On July 15, 1896, there being a balance of about $292 still due to the Crown on the pre-emption, the entry for the same was declared cancelled. On August 4, 1896, John Franklin Roberts made homestead entry for the said pre-emption as second homestead, and was granted patent therefor on April 5, 1900. On August 30, 1900, John Franklin Roberts gave to Hannah Sibbald Whitehead, on the said pre-emption, a mortgage for $500 and interest, which was duly registered.

Some time between 1892 and 1902, the devisee of the homestead under the said will, presumably with the co-operation of the executor, sold the same to a third party not connected with either of the said estates. On May 10, 1902, John Franklin Roberts died intestate, leaving a widow and eight children, of whom the

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plaintiff, then a little over 19 years old, was one; and on November 18, 1908, the defendants were granted administration of the estate, consisting of the said pre-emption and a certain half section, together with certain chattels. On December 22, 1908, the said Hannah Sibbald Whitehead, in consideration of the sum of $762.49, assigned her mortgage to the defendants in their own right.

The present value of the said pre-emption and half section, after deducting the amount of the mortgage due on each, is about $3,300 and $11,000 respectively.

Before the defendants became administrators, the chattels, valued at $1,500, were taken over by the plaintiff under an arrangement with his mother, in satisfaction of his share in his father's estate, then valued at about $900, and he giving his note to his mother for the difference. There have been moneys advanced from time to time to the heirs by the administrators on the security of the said pre-emption and half section which they hold. The plaintiff claims that it was but a year before instituting this action that he was made aware by his solicitor of the devise of the pre-emption to him in his grandfather's will, and asks that this quarter section be conveyed to him free of the mortgage thereon, the latter to be paid and satisfied out of his father's estate.

The defendants, as administrators, set up that they were unaware of the will of John Roberts, the elder, that the statement of claim discloses no ground of action, and that the plaintiff was guilty of laches. As defendants in their own right, they set up that the plaintiff has no cause of action under his pleadings.

I find on the evidence that, besides the said homestead and pre-emption, John Roberts, the elder, left nothing whatsoever at his death except a stove and a little furniture, which he bequeathed to one of his daughters. Mrs. Roberts, the plaintiff's mother, testified in this respect that she paid out of her own money the small debts left by John Roberts, the elder, as well as his funeral expenses.

I also find, taking the evidence of Mrs. Roberts and her two daughters as being inconclusive on that point, that it was only a year before commencing suit, as he states, that the plaintiff was apprised of his grandfather's devise in his behalf.

I should add that the homestead and pre-emption do not appear to have been worth more than about $400 each at the time

of the death of John Roberts, the elder, and with respect to the pre-emption this amount should be reduced by the sum of $292 due thereon to the Crown, for net value.

Mrs. Roberts, the plaintiff's mother, swears that she is sure that her husband had not $200 to spare and could not raise that amount at the time when the pre-emption entry was cancelled.

It then seems probable, on the evidence, that John Franklin Roberts, the executor, was in approximately impecunious circumstances during the short space of time from his taking probate to cancellation by the Crown. Of course, he could not very well, in the usual course, unless by some special arrangement, borrow money on the security of the pre-emption before it was fully acquired, and he had no power under the will to pledge the homestead for this purpose, although the testator had directed that the devisees (the two grandsons) should bear equally the burden of whatever was still due the Crown on the pre-emption. As to asking the direction of the Court, this also would require money, and he apparently did not wish to pledge his credit without a probability of being able to recoup himself. But, for all that, he took out probate, and undertook thereby to carry out the trust and to protect it.

The question to be considered here, however, is not so much one of the executor's neglect in carrying out his undertaking, as with respect to his peculiar position arising from the bare fact of his being a trustee.

In *Keech* v. *Sandford*, Select Ca. Ch. 61, a lessee of the profits of a market had devised the lease to a trustee for an infant, and the trustee applied for a renewal on behalf of the infant, which was refused on the ground that there could be no distress of the profits of a market, but the remedy must rest singly in covenant, of which an infant is incapable. There had been in that case no neglect of duty and no unfair advantage taken by the trustee; he had, in fact, duly applied for a renewal on behalf of the infant. But even then the Court would not depart from that rule of policy which is set against a trustee profiting by his trust, and Lord King said:—

> This may seem hard that the trustee is the only person of all mankind who might not have the lease, but it is very proper that the rule should be strictly pursued and not in the least relaxed.

And the Court's decree was that the lease be assigned to the infant.

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The defendants will then be declared to hold the south-west quarter in question in trust for the plaintiff.

At the same time, it is clear in the circumstances that the Whitehead mortgage, since taken over by the defendants in their own right, should not be discharged from this quarter section as prayed for, unless it be at the same time made a charge on the estate of John Franklin Roberts. This cannot be done in this action as it now stands, but the plaintiff should have leave to prosecute this issue, after making the heirs, and such others as he deems proper, parties thereto.

Moreover, there is the matter of the plaintiff having taken over the chattels as aforesaid, as well as the $292 paid by John Franklin Roberts to the Crown, and advance payments made from time to time to the heirs by the defendants—all of which will now require to be readjusted, as the value of John Franklin Roberts' estate will be lessened by the pre-emption falling out of it. It may then appear to the Court to be proper that the defendants, although holding as trustees for the plaintiff, should continue to hold the land as security for advances made to him.

There will be a declaration that the defendants hold the south-west quarter in trust for the plaintiff; that accounts be taken in the premises; with leave to the plaintiff, after adding proper parties, to pursue further in this action the issue of discharging the mortgage as a charge on said quarter section and having it declared a charge on John Franklin Roberts' estate; and for further directions. Question of costs is reserved.

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ALTA.

S. C.

**Re JASPER LIQUOR CO.**

*Alberta Supreme Court, Beck, J. July 6, 1915.*

CORPORATIONS AND COMPANIES (§ V F1—238) — *Shares—Agreement as to payment—Failure to register—Leave of Court to file.*] —Application for an order for the filing of a contract between two shareholders and the company, providing for the payment of the consideration for their shares otherwise than in cash.

*Houston*, for applicants.

*H. R. Milner*, for liquidator.

BECK, J.:—The circumstances shewn are very strong, and I have no doubt that I should make the order; the section expressly authorising the making of such an order, "either before or after an order has been made or an effective resolution has been passed

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for the winding-up of such company, and either before or after the commencement of any proceeding for enforcing the liability of such shares consequent on the omission" to file the contract.

After looking at some of the English cases under the corresponding English section, I think the order should be without prejudice to the rights of any creditors, if any such there be, who in the winding-up proceedings prove that they gave credit to the company on the faith of the shares in question having been issued on the footing that they should be paid for in cash. I have settled an order in the following terms:—

In the Supreme Court of Alberta, Edmonton Judicial District:

In the matter of The Jasper Liquor Co. Ltd., in liquidation under the Companies Winding-Up Ordinance 1903, ex parte

Morley P. Paul and Elzear Boivin.

Upon the application of Morley P. Paul and Elzear Boivin and upon reading the affidavit of Alexander Grant McKay and the exhibits therein referred to and upon hearing counsel for the applicants and for the liquidator of the company;

And it appearing that the applicants and the company entered into a contract in writing, dated April 2, 1914, whereby, for certain considerations therein expressed moving from the applicants to the company, the company agreed to issue and allot to the applicants 20 shares of the capital of the company of the nominal value of $100 each fully paid up in the proportions following: to the said Morley P. Paul 11 shares, and to the said Elzear Boivin, 9 shares; and that shares accordingly were issued and allotted to the applicants; but the contract was not filed with the Registrar of Joint Stock Companies as required by sec. 110 of the Companies Ordinance (ch. 20 of 1901).

And this Court being satisfied that the omission to file the said contract was accidental and that it is just and equitable to grant relief:

This Court doth order that the applicants be at liberty to file the said contract, together with a certified copy of this Order, with the Registrar of Joint Stock Companies on or before the 10th instant, and that thereupon the said contract shall operate, as if it had been duly filed with the Registrar within the time provided by the said sec. 110; provided that this Order shall not have the effect of validating the said contract, if otherwise it be found to be invalid in whole or part, nor prejudice the rights of any creditors, if any such there be, who in the winding-up proceedings prove that they gave credit to the company on the faith of the shares in question having been issued on the footing that they should be paid for in cash.

All the material on which this order is made should be filed with the Clerk of this Court. *Application granted.*

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**DOUGLAS v. BURLIE.**

SASK.
S. C.

*Saskatchewan Supreme Court, Lamont, J. June 10, 1915.*

VENDOR AND PURCHASER (§ I C—10)—*Inability to furnish title.*]—Action on an agreement for the sale of land.

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*T. P. Morton*, for plaintiff.

*Cowan*, for defendant Burlie.

LAMONT, J.:—This case differs from the case of *Hagen* v. *Ferris*, 21 D.L.R. 868, decided by me, in this: that in the *Hagen* case it was shewn at the trial that the plaintiff could not then deliver the title he had contracted to give, whilst in the present case I cannot say whether the plaintiff can or not. He has not put in evidence which shews conclusively that he can, although his inability to make title was alleged in the statement of defence. The plaintiff holds the land in question under an agreement or assignment from one Madill, who held under an agreement from Henry Rose and William J. Rose. Henry Rose is the registered owner. The plaintiff's payments, under the Madill agreement, were in arrear some $650, and he admitted that he could not say if the agreement between Henry and William J. Rose and Madill was still in force. He had been making his payments to Henry Rose, and had received no notice of any cancellation.

In the *Hagen* case I dismissed the action because it was shewn that plaintiff could not make title at the trial. In this case, as the plaintiff may have been able to make title but simply omitted to have the necessary evidence at the trial, I will direct a reference to the Local Registrar as to the ability of the plaintiff to make title, with liberty to the parties to apply for such judgment as the reference may disclose they are respectively entitled to.

As the defendant set up want of title in the plaintiff, and the plaintiff failed to shew good title at the trial, the defendant is entitled to all costs up to the time the plaintiff discovers a good title.

*Judgment accordingly.*

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K. B.

ARSENYCH v. WEST CANADA PUB. CO.

*Manitoba King's Bench, Galt, J. June 17, 1915.*

DISCOVERY AND INSPECTION (§ IV—32)—*Delay—Examination for discovery—Refusal to answer questions—Action for libel—Foreign newspapers.*]—Application to compel the answer of questions on discovery.

*Heap & Stratton*, for plaintiff.

*R. A. Bonnar*, K.C., and *W. H. Trueman*, for defendants.

GALT, J.:—This is an application on behalf of the defendant company to compel the plaintiff to answer certain questions put to him on discovery, and if the motion be granted, that the trial,

which is to take place to-morrow before a Judge and jury, be postponed.

It appears from the papers before me that this is an action of libel commenced on January 12, 1915; the statement of defence was filed on January 28; notice of trial was given on May 31. It appears that the parties, by their counsel, agreed to each examine the other's client or official on June 12. The first to be examined was the officer of the defendant company. When this was concluded the plaintiff was produced for examination, but, upon the advice of his counsel, Mr. Heap, he declined to answer a large number of questions. As I understand it, the questions related mainly to articles which were alleged to have appeared in a publication known as the "Ukrainian Voice," of which the plaintiff was president. The defendants contend that the words used by them in the libel complained of were called forth and provoked by the publications of the plaintiff in the "Ukrainian Voice."

It is quite impossible, on an application made a few hours before a trial relating to a number of publications in a foreign language, the very translation of which is more or less in question, to deal satisfactorily with such a motion as the present.

It certainly appears to be unfair that when counsel have agreed to an examination shortly before a trial, and one of them has succeeded in examining his opponent and then advises his client to decline to answer questions put by his opponent, that the party who has succeeded in examining the other party should be at liberty to use depositions so obtained.

Furthermore, with regard to the questions objected to, rule 411 provides:—

> If the party or person under examination demurs or objects to any question or questions put to him, the question or questions so put, and the demurrer or objection of the witness thereto shall be taken down by the examiner and transmitted by him to the officer of the Court where the pleadings are filed, to be there filed; and the validity of such demurrer or objection shall be decided by the Court or a Judge; and the costs of and occasioned by such demurrer or objection shall be in the discretion of the Court or a Judge.

The plain meaning of this rule, to my mind, is that when an objection is raised to answering a question the reason for such objection must be stated. This course was not adopted in the present instance, and I do not know even now the ground or

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grounds upon which such objections were made. It is simply a case of apparently relevant questions being asked and the witness declining to give any answer whatever. Rule 419 provides that

> any party may, at the trial of an action or issue, use in evidence any part of the examination of the opposite party; provided, etc.

As at present advised, I should be inclined to think that if the trial Judge felt that in any given case it was unfair that a party should use the depositions obtained by him, he might well refuse leave to the party to use them; but I am not sufficiently satisfied upon this point, and there is really no time to investigate the matter now.

The plaintiff also objects by notice that the defendants' officer refused on insufficient grounds to answer certain questions put on behalf of the plaintiff, and in this case also no demurrer or objection was taken down which would shew upon what grounds the witness was advised to decline to answer.

No doubt the defendant company is placed in an awkward position with regard to proceeding with the trial to-morrow if he be really entitled to an answer to the questions which the plaintiff refused to answer, but, considering that the defence here was filed on January 28 and that notice of trial was given on May 31, I think the defendant cannot fairly complain, at this late date, that he has not got information which he could have insisted on asking for several months ago.

I think the only disposition I can make of these motions is to refer them to the trial Judge, who will no doubt use his own discretion in the matter. *Order accordingly.*

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CASES—*continued.*